TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 728

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

JACOB A. GOLDMAN, LOUIS J. DESMARE, CLEM MINER, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

FILED JANUARY 31, 1938

(33175)

723

Appeal under Criminal
Appeals act of 1907

=

Information for Contempt
by Violation of decree in U.S.v
Coal Regrades et al - & - 24 Chapter
Act
The third par applies - this ch
has jurisdiction. =

I

a. Contempts are "Criminal Cases" -
Gompers v U.S. 233/604. Ex parte Grossman
267/87 - Michaelson U.S. 266/42.

b & c. Motion to dismiss here was based on
Clayton Act - which was barred

Clause that — alibi was barred
"plea at bar"
Mt Thompson 251/409
" Oppenheimer 242/85
" Rakemarker 238/78

a- No jeopardy —

II §25 - Clayton Act forbidding one year doing
with Officer § 24 except - Contempts
committed by Violation of U.S. decree —

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1 In United States District Court, Southern District of Ohio, Western Division

No. ——

THE UNITED STATES OF AMERICA, COMPLAINANT

v.

CALVIN U. WHIFFEN, HERMAN OELSCHLAGER, DANIEL P. HENDRICKSON, E. Conant Livingston, E. Murray Aerenschield, Paul G. Boehm, George H. Flaherty, Hugh B. Scott, Herman L. Barker, Alfred D. Evers, Joseph D. Myers, Ralph C. Brown, Leslie Claus, John A. Campbell, Robert A. Morris, Cornelius Penberthy, William B. Rich, John D. Cardall, Herman W. Meyers, Harry A. Barnes, George F. Finnegan, Lemuel E. Bell, George E. Baudrand, Charles S. Fortune, George D. Daum, Arnold L. Wood, Frank A. Grady, Richard Ward, Jack Fogarty, Edward W. Tillson, Stanley E. Stout, George J. McCarthy, William E. Zimmerman, Howard T. Bennett, William C. Bryant, Edmund A. Peiser, Aaron C. Sample, Jerome B. Bliss, Norval F. Robbins, Emanuel B. Peterson, Lester H. Bolte, Leroy Lynch, Thomas W. McCue, Jacob A. Goldman, Wilbur J. Long, Louis J. Desmare, Neven C. Hawthorn, Coman Norton, John T. Collins, John G. Shankle, Goldwin Smith, Clem Miner, Stephen L. Perry, David R. Crandall, Clarence J. Ramspott, Hugh Montgomery, Cletus C. Deardorf, John A.
2 Muldoon, Ray V. Sullivan, Edward L. Blake, Walter D. Young, Henry C. Cook, Frank E. O'Connor, George A. Baker, Walter M. Stearns, Nathan H. Wetstein, Eugene L. Gleason, Edward H. Schmeiding, Fred. I. Schmeiding, William S. Clark, Harry A. Wackerly, Leo J. McCoy, Marquette Lane, Nathan W. Dubbs, Chester C. Hixenbaugh, John A. Hickey, Harry L. Dubel, Richard J. Brace, Joseph H. Hall, Joseph B. Cummins, Philip J. Seibert, Harlow E. Johnson, Max Peller, John W. Poppenberg, jr., Robert J. Kavelage, Harvey S. Crocker, Charles T. Walsh, Lawton J. Boudreau, Charles R. Moore, Barby G. Welton, Edward T. Balfrey, and Harold V. O'Bryan, defendants

Information charging criminal contempt

To the honorable SMITH HICKENLOOPER,
Judge of the District Court of the United States for the Southern District of Ohio.

The United States of America, by Haveth E. Mau, its attorney for the Southern Judicial District of Ohio, acting under the direction of John G. Sargent, its Attorney General, presents this information and petition for a rule and for attachments, and complains against the persons hereinafter named, all of whom, with the ex-

ception of Emanuel B. Peterson and George F. Finnegan, during the times of the commission of the numerous wrongful and illegal acts which they are hereinafter severally charged with having committed, where either in the employ of the National Cash Register Company (a corporation organized and existing under the
3 laws of the State of Ohio, and engaged in the manufacture of cash registers at its factory at the city of Dayton, Ohio) as members of what is commonly known as the selling force of said corporation, and during all said times were engaged in the sale in the several States of the United States of the cash registers so manufactured by said corporation as above stated, or in the employ of the agents of said corporation (whether such agents were designated by said corporation as district managers, sales agents, salesmen, or otherwise), and during all said times were engaged in the sale in the several States of the United States of the cash registers so manufactured by said The National Cash Register Company at Dayton, Ohio, as above stated, and shipped by said corporation into the several States of the United States for sale therein by the persons hereinafter named as defendants and the other members of its selling force.

The said Emanuel B. Peterson, during the times of the commission of the several wrongful and illegal acts which he is hereinafter charged with having committed, was engaged in the business of selling Underwood typewriters at and in the territory surrounding the city of Pocatello, in the State of Idaho.

The said George F. Finnegan, during the times of the commission of the several wrongful and illegal acts which he is hereinafter charged with having committed, was engaged in the business of selling scales, known as the Toledo scales, at and in the territory surrounding the city of Riverside, in the State of California.

4 The names, and the present addresses so far as known, of the several persons herein charged with the commission of the numerous wrongful and illegal acts hereinafter severally charged against them, are as follows:

DEFENDANTS

Name	Address
Calvin U. Whiffen	Los Angeles, Calif.
Herman Oelschlager	Orange Cove, Calif.
Daniel P. Hendrickson	Los Angeles, Calif.
E. Conant Livingston	Stockton, Calif.
E. Murray Aerenschield	Stockton, Calif.
Paul G. Boehm	Stockton, Calif.
George H. Flaherty	Los Angeles, Calif.
Hugh B. Scott	Los Angeles, Calif.
Herman L. Barker	Miami, Fla.
Alfred D. Evers	Los Angeles, Calif.
Joseph D. Myers	Los Angeles, Calif.
Ralph C. Brown	Los Angeles, Calif.

	Name	Address
	Leslie Claus	Los Angeles, Calif.
	John A. Campbell	Los Angeles, Calif.
	Robert A. Morris	Santa Barbara, Calif.
	Cornelius Penberthy	Los Angeles, Calif.
	William B. Rich	San Bernardino, Calif.
	John D. Cardall	San Bernardino, Calif.
	Herman W. Meyers	Long Beach, Calif.
	Harry A. Barnes	Long Beach, Calif.
	George F. Finnegan	Riverside, Calif.
	Lemuel E. Bell	San Diego, Calif.
	George E. Baudrand	Santa Rosa, Calif.
	Charles S. Fortune	Sacramento, Calif.
	George D. Daum	Sacramento, Calif.
	Arnold L. Wood	Sacramento, Calif.
	Frank A. Grady	Santa Rosa, Calif.
	Richard Ward	San Jose, Calif.
	Jack Fogarty	Asbury Park, N. J.
	Edward W. Tillson	San Francisco, Calif.
	Stanley E. Stout	San Francisco, Calif.
	George J. McCarthy	San Francisco, Calif.
	William E. Zimmerman	San Francisco, Calif.
	Howard T. Bennett	San Francisco, Calif.
	William C. Bryant	San Francisco, Calif.
	Edmund A. Peiser	Oakland, Calif.
	Aaron C. Sample	Salem, Oreg.
	Jerome B. Bliss	Pocatello, Idaho.
	Norval F. Robbins	Pocatello, Idaho.
	Emanuel B. Peterson	Pocatello, Idaho.
	Lester H. Bolte	Salt Lake City, Utah.
	Leroy Lynch	Denver, Colo.
5	Thomas W. McCue	Dallas, Tex.
	Jacob A. Goldman	New Orleans, La.
	Wilbur J. Long	New Orleans, La.
	Louis J. Desmare	New Orleans, La.
	Neven C. Hawthorn	New Orleans, La.
	Coman Norton	New Orleans, La.
	John T. Collins	Miami, Fla.
	John G. Shankle	Tampa, Fla.
	Goldwin Smith	Des Moines, Iowa.
	Clem Miner	Des Moines, Iowa.
	Stephen L. Perry	Fon du Lac, Wis.
	David R. Crandall	St. Louis, Mo.
	Clarence J. Ramspott	Cairo, Ill.
	Hugh Montgomery	Charlotte, N. C.
	Cletus C. Deardorf	Lexington, Ky.
	John A. Muldoon	Chicago, Ill.
	Ray V. Sullivan	Milwaukee, Wis.
	Edward L. Blake	Milwaukee, Wis.

Name	Address
Walter D. Young	Milwaukee, Wis.
Henry C. Cook	Jackson, Mich.
Frank E. O'Connor	Lansing, Mich.
George A. Baker	Detroit, Mich.
Walter M. Stearns	Detroit, Mich.
Nathan H. Wetstein	Youngstown, Ohio.
Eugene L. Gleason	Columbus, Ohio.
Edward H. Schmeiding	Canton, Ohio.
Fred I. Schmeiding	Canton, Ohio.
William S. Clark	Canton, Ohio.
Harry A. Wackerly	Canton, Ohio.
Leo J. McCoy	Cleveland, Ohio.
Marquette Lane	Cleveland, Ohio.
Nathan W. Dubbs	Pittsburgh, Pa.
Chester C. Hixenbaugh	Pittsburgh, Pa.
John A. Hickey	Philadelphia, Pa.
Harry L. Dubel	Philadelphia, Pa.
Richard J. Brace	Wilkes-Barre, Pa.
Joseph H. Hall	Scranton, Pa.
Joseph B. Cummins	Brooklyn, N. Y.
Philip J. Seibert	Brooklyn, N. Y.
Harlow E. Johnson	Brooklyn, N. Y.
Max Peller	Brooklyn, N. Y.
John W. Poppenberg, jr	Brooklyn, N. Y.
Robert J. Kavelage	Elizabeth, N. J.
Harvey S. Crocker	Boston, Mass.
Charles T. Walsh	Fitchburg, Mass.
Lawton J. Boudreau	Utica, N. Y.
Charles R. Moore	Boston, Mass.
Barby G. Welton	Pittsfield, Mass.
Edward T. Balfrey	Lawrence, Mass.
Harold V. O'Bryan	Lawrence, Mass.

6 And complainant now here informs the court:

I

That on December 4, 1911, the United States of America filed its petition in the Circuit Court of the United States for the Southern District of Ohio, Western Division, against the National Cash Register Company; John H. Patterson, E. A. Deeds, G. C. Edgeter, W. F. Bippus, Robert Patterson, J. A. Oswald, S. W. Davies, George G. Shaw, E. H. Bunstine, H. G. Carnell, A. A. Thomas, Thomas J. Watson, Joseph Rogers, Alexander Harned, F. S. High, M. G. Keith, W. M. Cummings, J. C. Laird, Pliny Eves, A. A. Wentz, George E. Morgan, C. T. Walmsley, W. C. Howe, C. A. Snyder, Walter Cool, E. H. Epperson, Myer N. Jacobs, and M. L. Lasley, being Equity Cause No. 6802, in which it charged that the several

defendants named therein, by the use of the unfair and unlawful means set forth in said petition, were engaged in a combination and conspiracy to restrain the interstate and foreign trade and commerce in cash registers and other registering devices, of other persons, firms, and corporations engaged in the manufacture and in the sale in interstate and foreign commerce of cash registers and other registering devices, in competition with said defendants, and that by the use of the unfair and unlawful means charged in said petition said defendants were attempting to monopolize, and were monopolizing, such trade and commerce of such other persons, firms, and corporations in cash registers and other registering devices.

7 II

That such proceedings were had in said cause; that on February 1, 1916, there was entered therein a final decree, which, since the time it was entered, has continuously remained in full force and effect, and now is in full force and effect, which said final decree (caption omitted) is in the words and figures following:

FINAL DECREE

This day come the parties, by their counsel, and thereupon the defendants hereinafter named, consenting not to oppose the entry of the following decree, as more fully appears by their written consent on file herein, and the plaintiff, through its counsel, having moved for an injunction, on consideration thereof the court finds for the plaintiff and against said defendants, and that the plaintiff is entitled to the relief prayed for in the following particulars:

It is therefore ordered, adjudged, and decreed:

First. That the defendants, the National Cash Register Company, John H. Patterson, G. C. Edgeter, W. F. Bippus, Robert Patterson, George G. Shaw, H. G. Carnell, Alexander Harned, F. S. High, M. G. Keith, W. M. Cummings, J. C. Laird, Pliny Eves, C. T. Walmsley, C. A. Snyder, E. H. Epperson, Myer N. Jacobs, and M. L. Lasley, have combined to restrain and have attempted to monopolize interstate and foreign trade and commerce in cash

8 registers in violation of sections 1 and 2 of the anti-trust act of July 2, 1890, by one or another of the means hereinafter enjoined.

Second. That the defendant, the National Cash Register Company, its directors, officers, agents, and employees, and the individual defendants, John H. Patterson, G. C. Edgeter, W. F. Bippus, Robert Patterson, George G. Shaw, H. G. Carnell, Alexander Harned, F. S. High, M. G. Keith, W. M. Cummings, J. C. Laird, Pliny Eves, C. T. Walmsley, C. A. Snyder, E. H. Epperson, Myer N. Jacobs, and M. L. Lasley, their employees, agents, and servants, and any other persons authorized to act or acting for or in behalf of any of them

be and they are hereby jointly and severally enjoined and restrained as follows:

(a) From persuading or inducing, or attempting to persuade or induce, a purchaser of a cash register or other registering device manufactured or sold by any competitor, or a person who has agreed or contracted to become such purchaser, to break or repudiate his contract of purchase, or to return or refuse to receive the cash register or other registering device so bought or agreed to be bought, or to refuse to pay for the same in accordance with his agreement with said competitor.

(b) From espionage upon a competitor or his agent, or a solicitor of a competitor, or upon a retail dealer in the cash registers or other registering devices of a competitor, for the purpose of obtaining the names or addresses of purchasers or prospective pur-
9 chasers from any such competitor or retail dealer, or for the purpose of obtaining any other information as to his private affairs or business; and from using any information so obtained in order to dissuade or endeavor to dissuade any person or persons from purchasing any cash register or other registering device manufactured or sold by a competitor.

(c) From inducing, or attempting to induce, either directly or through another, any employee or ex-employee of any competitor, or of his agent or dealer, to disclose to said defendants or to either of them or to any person for them or for either of them the business secrets of his employer or former employer.

(d) From inducing, or attempting to induce, any employee or agent of a compeitor, or any dealer in the cash registers or registering devices of a competitor, to leave the service of such competitor, or to cease to deal in such competitor's cash registers or other registering devices, and from employing or attempting to employ any such agent or employee so induced to leave the service of a competitor, or any such dealer so induced to cease dealing in the cash registers or other registering devices of a competitor, as an agent or employee of the defendant corporation or any company organized as a successor to its business in whole or in part.

(e) From using any information as to the trade secrets or business confidences of any competitor which shall have been derived from any person who shall have been in the employ of any such
10 competitor and which shall have been obtained by him in the course or by means of such employment.

(f) From manufacturing, selling, or offering for sale any cash register or other registering device made to resemble in appearance a competing cash register or registering device, or producing, or designed to produce, the same or similar results, or performing, or designed to perform, the same or similar functions, when sold or offered for sale, not in good faith for the purpose of earning profits therefrom, but for the dominant purpose of preventing sales of such competing cash registers or registering devices, or of inducing

the purchaser or owner of the competing cash register or registering device to substitute therefor one of such similar machines; or from selling any cash register or registering device at a price fixed with reference not to the cost of manufacture but solely with reference to the price of the said competing cash register or register device, for the purpose of driving from business in interstate or foreign commerce the manufacturer of or dealer in such competing cash registers or other registering devices.

(g) From selling or otherwise disposing of any cash register or other registering device manufactured by a competitor, whether acquired by purchase, exchange, or otherwise, not for the purpose of realizing therefrom as much as practicable but for the dominant purpose or intent of preventing sales by a competitor or retail dealer in the cash registers or registering devices of a competitor, and
11 from acquiring any such cash register or other registering device, manufactured by any competitor, for any of the purposes specified in this subparagraph of this decree.

(h) From selling or otherwise disposing of any second-hand cash register or other registering device of the defendant's own make for the purpose not of realizing therefrom as much as practicable but for the dominant purpose of underselling a competitor and driving him from business: Provided, That nothing herein contained shall prevent any sale or offer at a price made in good faith to meet competition.

(i) From employing any person, whether known as a "special man," or "competition man," hereby defined to be an employee, to have as his principal business not the promotion of the sale of cash registers or other registering devices of the make of the defendants, or the solicitation of orders therefor, but the prevention of sales of cash registers or other registering devices by a competitor, or his agent or dealer.

(j) From following from one city or village to another, or from one place in the same city or village to another place therein, any competitor, or his salesman, or agent, or any dealer in a competitive cash register or other registering device, for the purpose of hindering such competitor, salesman, agent, employee, or dealer, while attempting to sell any cash register or other registering device, or for the purpose of ascertaining the names of the persons upon whom, or the places of business at which such competitor, salesman, agent, employee, or dealer, may call.

12 (k) From making or circulating, or causing to be made or circulated, any statement, report, representation, or insinuation reflecting upon the solvency or responsibility, financially or otherwise, of any competitor, or upon the efficiency of any competing cash register or other registering device, when such statement, report, representation, or insinuation is either a misrepresentation or is made for the mere purpose, not of directly promoting the sale of registers or other registering devices manufactured by defendants,

but of preventing the sale of competing cash registers or other registering devices, or of driving such competitor from business.

(l) From using or publishing, or causing to be used or published, any document, circular, or letter the purpose or intent of which is to recommend or suggest to agents or employees of the defendants the doing of any act herein forbidden; and from in any manner communicating to such agents or employees any means of accomplishing or bringing about any such act.

(m) From intimidating, or attempting or threatening to intimidate any competitor or any person contemplating becoming a competitor in the manufacture or sale of cash registers or other registering devices in interstate or foreign commerce by maintaining or making a display of models of machines of the defendant's make, together with various rival machines which they were built to resemble or to displace, or by maintaining or making a display of quantities
13 of second-hand registers or other registering devices of a competitor, or by displaying placards or statements purporting to show the amounts lost by various competitors in an effort to compete with the defendant corporation or its predecessors, and from intimidating or attempting or threatening to intimidate, by any such means, investors, or persons contemplating becoming investors in the stocks or other securities of competing companies formed or to be formed.

(n) From maintaining as an obstensible competitor any corporation organization owned, directed, or controlled, by stock ownership or otherwise, by said defendants or any of them or affiliated with them or any of them without disclosing the connection with the said defendants.

(o) From intimidating, or attempting or threatening to intimidate purchasers or prospective purchasers of competing cash registers or other registering devices, with suit or liability for patent infringement unless and until such claim of infringement has been sustained by a court of competent jurisdiction. But nothing herein contained shall prevent defendant corporation or its proper representative from serving in good faith upon any such purchaser a formal notice of its claim of infringement.

(p) From acquiring ownership or control directly or indirectly, by means of stock ownership or otherwise, of the whole or an essential part of the business, patents, or plant of any competitor engaged
14 in the manufacture or sale of cash registers or other registering devices in interstate or foreign commerce: Provided, That in case any such acquisition is desired, a petition may be presented to this court stating the reasons therefor, and if the court, upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney General, shall determine that such business or patents or plant so desired to be acquired will supplement the plant, patents, machines, or facilities of the defendant corporation and that the acquisition thereof is de-

sired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right.

THIRD. That jurisdiction of this cause be and is hereby retained for the purpose of enforcing this decree, and for the purpose of enabling the parties to apply to the court for modification hereof if it be hereafter shown to the satisfaction of the court that by reason of changed conditions or changes in the statute law of the United States the provisions hereof have become inappropriate or inadequate to maintain competitive conditions in interstate or foreign trade in cash registers or other registering devices in the United States, or have become unduly oppressive to the defendants and are no longer necessary to secure or maintain competitive conditions in such interstate and foreign trade.

FOURTH. That defendants pay the costs of this suit to be taxed.

FIFTH. That said petition be and it is hereby dismissed without prejudice as against the defendants S. W. Davies, E. H. Bunstine, A. A. Thomas, and A. A. Wentz.

HOLLISTER, *Judge*.

FEBRUARY 1, 1916.

III

That each of the several persons named as defendants herein, at and prior to the times he made the false and the unfair statements, and committed the wrongful and illegal acts, which he is hereinafter severally charged with having made and committed, had been fully advised with respect to all the provisions of said final decree so entered in said cause on February 1, 1916, and then knew, or had good reason to believe, that said statements and acts were in violation of the provisions of said decree.

IV

That the statements, representations, and insinuations, made by the several defendants, as charged herein, reflecting upon the solvency or responsibility, financially or otherwise, of the companies and persons engaged in the manufacture and sale, or sale, in interstate commerce, of competing cash registers, and especially of the Remington Cash Register Company, Inc., or reflecting upon the efficiency of competing cash registers, and especially of Remington cash registers, as hereinafter charged, were willful misrepresentations, some being false and unfair, and others false and unfair as made; and the demonstrations and pretended demonstrations made upon competing cash registers, and especially upon Remington cash registers, by the several persons named as defendants herein, to purchasers and prospective purchasers of Remington cash registers and of other competing cash registers, as hereinafter charged, were fraudulent, deceptive, and unfair; all such statements and demonstrations either being misrepresentations, or made and

given for the mere purpose, not of directly and fairly promoting the sale of National cash registers, but by such false and unfair means, either of preventing sales of competing cash register, and especially sales of Remington cash registers or of inducing persons who had purchased such competing cash registers to break their contracts of purchase and to return such cash registers to the persons from whom they had purchased them, or to refuse to accept such cash registers so purchased, or to refuse to make further payments upon the purchase price of cash registers purchased, and thus to force the companies and their salesmen to retake them, and thereby to drive the manufacturer of such competing cash registers, and the persons selling such competing cash registers, out of business.

V

That by reason of the willful, wrongful, and illegal acts committed by the several persons named as defendants herein, manufacturers of cash registers competing in interstate and foreign com-
17 merce with the cash registers of said The National Cash Regis-
ter Company, above named, and especially the Remington Cash Register Company, Inc., which manufacturers its cash register at its factory at Ilion, New York, and salesmen for all such competing cash registers, whether new or secondhand cash registers including salesmen for Remington cash registers, have been greatly harassed in the sales of their cash registers; have had sales of their cash registers canceled; have had purchasers thereof refuse to receive them; have had purchasers thereof refuse to make further payments upon their purchase price, and have thus forced the companies and their salesmen to retake such cash registers, thus causing loss to them; by reason whereof such manufacturers of such competing cash registers, and the salesmen for such competing cash registers, have suffered great loss and damage in the manufacture and in the sale of such cash registers, so manufactured and sold in interstate commerce in competition with the cash registers of said The National Cash Register Company.

VI

That all said willful, wrongful, and illegal statements and acts made and committed by the several persons named as defendants herein, and as hereinafter charged, were made and committed with full knowledge, and in defiance of the terms of said final decree entered in said Equity Cause No. 6802, on February 1, 191-
18 and in contempt of the authority of this court, all with a view to driving all manufacturers of, and salesmen for, competing cash registers out of business.

VII

Wherever the words "the National Cash Register Company" are used in this information, they refer to the National Cash Regis-

Company against which said final decree was entered in the United States District Court for the Southern District of Ohio, Western Division, at Cincinnati, Ohio, on February 1, 1916, in the case of the United States of America, complainant v. The National Cash Register Company et al., being Equity Cause No. 6802 in said court, and wherever the word "Decree" is used in this information, it refers to the decree entered on that date in that cause.

VIII

Complainant therefore, avers and charges that the several defendants named herein have severally, willfully, and knowingly disobeyed and violated the prohibitions contained in said final decree entered in said cause on February 1, 1916, as before stated, by the means, in the manner, and for the purposes as herein stated:

CHARGES

19 ### Defendant Herman Oelschlager

The defendant Herman Oelschlager, during the various times he did the wrongful and unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, was employed at Los Angeles, Cal., as a salesman for National Cash Registers (under the authority of the defendant, Calvin U. Whiffen, sales agent), for the National Cash Register Company.

20 (d) On or about July 1, 1923, Jacob Gelsinger, then owner of a meat market at 46th and Central Avenue, Los Angeles, Cal., desired to purchase a cash register for his said place of business. Prior thereto said Gelsinger had had demonstrated to him a Remington cash register, and had about decided to purchase such a cash register.

The defendant Herman Oelschlager when advised by said Gelsinger, on or about July 1, 1923 (the precise date being unknown to complainant), that he, said Gelsinger, had about decided to purchase a Remington cash register, then and there, among other things, in substance, stated to said Gelsinger:

That the National Cash Register Company was taking in Remington cash registers all the time;

That a Remington cash register would last only thirty days and then the customer would become dissatisfied and turn it in and buy a National cash register; and

That he would take him to the National Cash Register office in said city of Los Angeles and show him a lot of secondhald cash registers that he could buy cheap.

And also then and there made other false and derogatory statements concerning Remington cash registers.

As a result of these statements said Gelsinger did then visit the office of said National Cash Register Company in Los Angeles, then

under the authority of the defendant, Calvin U. Whiffen, and that while in said office, for the purpose above stated, the defendant Daniel P. Hendrickson, then floor salesman in said office as heretofore in this complaint stated—

21 Took said Gelsinger back into a storeroom in the rear of said office and then and there pretended to demonstrate to him the alleged defects of Remington cash register, upon a Remington cash register then being retained in said room for such purpose.

Said Hendrickson then and there stated that he could sell said Gelsinger said Remington cash register for $125.00, and then proceeded to show said Gelsinger how it was possible to reset the adding wheels of said cash register without the control key, and also made said cash register give an incorrect total, through trickery, or through the fact that said cash register had been tampered with in order to make it appear to be defective, and as a result of which false and unfair statements on the part of the defendant Herman Oelschlager and such false statements and demonstration on the part of said defendant Daniel P. Hendrickson said Gelsinger was thus wrongly induced to purchase a National cash register;

All of which being in willful violation of paragraph K of said decree.

Defendant Daniel P. Hendrickson

The defendant Daniel P. Hendrickson, during the various times he did the wrongful and unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, was employed at Los Angeles, Cal., as a salesman for National cash registers (under the authority of the defendant Calvin U. Whiffen) for the National Cash Register Company.

22 (a) On or about July 10, 1923, Jacob Gelsinger, of 2075 West Jefferson St., Los Angeles, Cal., then operating a number of meat markets in said city, was a prospective purchaser for a cash register. After salesmen for both National and Remington cash registers had demonstrated to him their respective cash registers, said Gelsinger, on or about July 10, 1923, went to the office of the National Cash Register Company and of the defendant Calvin U. Whiffen, in Los Angeles, for the purpose of making a further investigation of the merits of said cash registers.

While in said office on said date, having stated that he was interested in the Remington cash register, he was thereupon taken in charge by the defendant Daniel P. Hendrickson, then employed as floor salesman in said office by said Calvin U. Whiffen, in the sale of National cash registers, who then proceeded to make to said Gelsinger a pretended demonstration upon a Remington cash register then in said office.

During said demonstration, with a view to discrediting the efficiency and reliability of Remington cash registers, said Hendrickson

showed said Gelsinger how it was possible to reset the adding wheels of said registers without the use of the control key, and then and there also manipulated said cash register in such a way that after ringing up a number of pretended sales upon the register it registered an incorrect total.

As a result of such unfair and false demonstration upon said Remington cash register, said Gelsinger was led to believe that Remington cash registers were defective and not reliable, and he thereupon purchased two National cash registers; that said results were accomplished by said Hendrickson by means of trickery and deception and for the purpose of discrediting said cash registers, all in willful violation of paragraph K of said decree.

23 Defendant E. Conant Livingston

The defendant E. Conant Livingston, during the various times he did the wrongful and unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, was employed at Los Angeles, Cal., as a salesman for National cash registers (under the authority of the defendant Calvin U. Whiffen), for the National Cash Register Company.

(b) On or about August 27, 1923, Basil R. Clark, druggist at 1701 West Adams St., Los Angeles, Calif., purchased through a Remington salesman two Remington cash registers.

Shortly thereafter (the precise date being unknown to complainant), the defendant E. Conant Livingston came to the store of said Clark and tried to sell him a National cash register, but was advised by said Clark that he had already purchased Remington cash registers.

Thereupon said Livingston criticised his judgment for having purchased Remington cash registers, advised him how it was possible to reset the adding mechanism on Remington cash registers without the use of the control key, and invited said Clark to visit the Los Angeles office of the National Cash Register Company in order that he might there demonstrate to him, said Clark, how it was possible to do so, but Mr. Clark refused to do so.

Said Livingston also then stated to said Clark, in substance, that many of the Remington users were having trouble with their Remington cash registers, and that he believed it to be a matter of only a few months until he, Clark, would have trouble with them.

Thereupon said Livingston further criticised said Clark for having bought Remington cash registers, and made other derogatory statements concerning said cash registers.

That said statements were made to said Clark by said Livingston for the purpose of discrediting said Remington cash registers, and of thereby trying to induce said Clark to cancel his contract for them and to purchase National cash registers.

All of which was in willful violation of paragraphs A and K of said decree.

24 Defendant E. Murray Aerenschield

The defendant E. Murray Aerenschield, during the several times he did the wrongful and unfair things and made the false and the unfair statements respecting Remington cash registers, as now here charged, was employed at Los Angeles, Cal., as a salesman for National cash registers (under the authority of the defendant Calvin U. Whiffen), for the National Cash Register Company.

(a) On or about April 24, 1923, H. S. Springer, then operating a drug store at 2929 South Vermont St., Los Angeles, Cal., purchased through a Remington salesman a Remington cash register, and on or about May 25, 1923, purchased through said salesman, a second Remington cash register.

Shortly after the purchase of said cash registers by said Springer (the precise date being unknown to complainant), and upon several occasions thereafter (the precise dates not being known to complainant), but within three or four months after his purchase of said cash registers, the defendant E. Murray Aerenschield came into his place of business and upon seeing his Remington cash registers stated, in substance, to said Springer, upon one of said occasions, that his Remington cash registers were a pile of tin; that Remington cash registers were no good and that the National Cash Register Company was trading them in every day; that he could get said Springer a used Remington cash register from a dissatisfied user at approximately one-half of the regular price of Remington cash registers; and upon the occasions of his several visits made other and similar remarks derogatory of Remington cash registers, all for the purpose and with the intent of attempting to discredit the efficiency of Remington cash registers, with the intent of thereby inducing said Springer either to trade his Remington cash registers upon a National cash register, or to break his contract for his Remington cash registers, and all in willful violation of paragraphs A and K of said decree.

25 Defendant George H. Flaherty

The defendant George H. Flaherty, during the several times he did the wrongful and unfair things and made the false and the unfair statements respecting Remington cash registers, as now here charged, was employed at Los Angeles, Cal., as a salesman for National cash registers (under the authority of the defendant Calvin U. Whiffen), for the National Cash Register Company.

(a) On or about January 30, 1923, Mrs. Mariam Richter, owner of a gas service station at 901 East 12th St., Los Angeles, Cal., purchased through a Remington salesman a Remington cash register.

26 After her purchase of said cash register and prior to September 1, 1923, the defendant George H. Flaherty from time to time between said dates (the precise dates being unknown to

complainant) called upon her several times for the purpose of trying to induce her to break her contract for the purchase of her Remington cash register and to purchase a National cash register.

Upon some of these visits said Flaherty brought with him other salesmen for National cash registers, and also brought with him and demonstrated to her a Remington cash register. Said Flaherty, by some means unknown to her, caused the Remington cash register he had with him to add incorrectly, but was unable to manipulate her register so that it would do so, his purpose in making such a pretended demonstration of said Remington cash register being to lead said Mrs. Richter to believe that her cash register was not reliable and would not afford her proper protection against employees who might wish to defraud her.

Upon another occasion said Flaherty brought to her place of business a Remington cash register which, he stated, in substance, had been used but one week and which became so loose that the purchaser, although he had nearly completed payment of the purchase price, became so disgusted with it that he was willing to lose all he had paid upon it and bought a National cash register.

Upon one occasion, without her consent, said Flaherty, rep-
27 resenting himself to be the son of her, said Mariam Richter, called up the Remington cash register salesmen over the telephone and stated that she was dissatisfied with her Remington cash register which she had purchased of them and wished them to take it away.

During these visits said Flaherty and the salesmen for National cash registers who came with him made many statements derogatory of Remington cash registers.

As a result of these visits and of this conduct upon the part of the defendant George H. Flaherty, about September 1, 1923, he induced her to sign a contract for a National cash register, he agreeing to pay $80.00, the amount then unpaid upon her said Remington cash register.

All of these unfair things were done and all of these false and unfair statements made by the defendant George H. Flaherty, derogatory of Remington cash registers, for the purpose of attempting to induce said Mariam Richter to break her contract for the purchase of her said cash register and to purchase a National cash register, all in willful violation of paragraphs A and K of said decree.

(b) On or about July 24, 1923, C. E. Cole and C. R. Ransom, partners in a restaurant, at 1429 Central Avenue, Los Angeles, Calif., purchased through a Remington salesman a Remington cash register.

Within a few days thereafter (the precise date being unknown to complainant) the defendant George H. Flaherty came to the
28 restaurant of said Cole and said Ransom and upon seeing their said Remington cash register said to them, in substance: "Why don't you take that register out and put in a National?"

Further stating to them that they had paid $200.00 for a register in a two-bit place; that he could sell them a cash register for $75.00 that would do their work and give them entire satisfaction, and then and there made many other remarks derogatory of Remington cash registers in trying to induce them to cancel their order for the Remington cash register, send it back to the Remington Cash Register Company, and purchase a National cash register.

That for a period of about thirty days thereafter the defendant Flaherty returned to their place of business almost daily, making many remarks similar to those above set out, and otherwise trying to induce said Cole and said Ransom to cancel their contract for their Remington cash register and to purchase a National cash register, until finally they ordered said Flaherty to stay away from their place of business.

All of which things were said and done by the said George H. Flaherty for the purpose of trying to induce said Cole and said Ransom to cancel their contract for the purchase of their Remington cash register, return it to the company, and to purchase a National cash register, all in willful violation of paragraphs A and K of said decree.

29 Defendant Joseph D. Myers

The defendant Joseph D. Myers, at the times he did the unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, was a salesman for National cash registers at Los Angeles, Cal. (under the authority of the defendant Calvin U. Whiffen), for the National Cash Register Company.

30 (a) On or about April 14, 1923, Albert L. Marsh, owner of a lunch room and pool room at 6091 Sunset Blvd., Hollywood, Cal., purchased through a Remington salesman a Remington cash register, which was installed in his place of business a short time thereafter.

About one month after the installation of his cash register (the precise date being unknown to complainant) the defendant Joseph D. Myers visited the place of business of said Marsh and, upon seeing the Remington cash register in his place of business then and there stated to Marsh that the National Cash Register Company was entitled to all of the cash-register business there was, since that company had developed the business and brought it to its present development.

That about a week thereafter (the precise date being unknown to complainant) the defendant Joseph D. Myers again visited the place of business of said Marsh, and upon being advised by said Marsh that he had purchased the Remington cash register then in his place of business then and there tried to induce the said Marsh to cancel his contract for his Remington cash register and to purchase a National cash register, and suggested to Marsh that by doing so he suggested he could get rid of his Remington cash register, pur-

chase a National register, and make $25.00 or $50.00 in the transaction.

For the purpose of so trying to induce said Marsh to cancel his contract for his Remington cash register, said Myers stated to
31 him, in substance, that he, said Myers, was trying to sell a National cash register to a merchant named Mihiel, whose place of business was located near the place of business of said Marsh, said Mihiel being the owner of a Remington cash register. Said Marsh was to return his Remington cash register to the Remington Cash Register Company, cancel his contract for the same, then purchase from said Mihiel his Remington cash register, assume the remaining indebtedness upon it, and that then said Myers would sell to said Mihiel a National cash register, the said Marsh to save from $25.00 to $50.00 under the suggested arrangement; but said Marsh refused to become a party to the scheme.

The defendant Joseph D. Myers at the time he so suggested to said Marsh that he cancel his contract for his Remington cash register and purchase the cash register claimed by said Myers to have been owned by said Mihiel also stated to said Marsh, in substance, that the Remington Cash Register Company would not be in business very long; that if the printing-paper detail strip on the Remington cash register ever ran out on him during the day it would be impossible for him to obtain a total of the day's business or to tell how much business he had done at all, and also then and there made other false and unfair statements to said Marsh respecting Remington cash registers, all of which statements and offers on the part of said Myers were made for the purpose of trying to induce said Marsh to cancel his contract for his Remington cash register and to purchase a National cash register, and all of which were in willful violation of paragraphs A and K of said decree.

32 Defendant Jack Fogarty

The defendant Jack Fogarty, at the times he did the wrongful and unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, was a salesman at Stockton, Cal., for National cash registers (under the authority of the defendant E. Conant Livingston) for the National Cash Register Company.

(a) On or about October 6, 1923, H. L. Waycott, proprietor of the Art Floral Company, 140 North Carolina St., Stockton, Cal., purchased through a Remington salesman a Remington cash register.

Shortly thereafter (the precise date being unknown to complainant), and after said cash register had been installed in the place of business of said Waycott, the defendant Jack Fogarty called at his place of business and upon being advised by said Waycott that he had purchased the Remington cash register then and there, among other things, stated, in substance, to said Waycott:

That Remington cash registers would not add correctly; that his cash register would soon wear out; advised said Waycott to throw

his tin can (meaning his Remington cash register) out and send it back to the Remington Company before it was too late and to purchase a National cash register; and then and there also made other false statements to said Waycott respecting Remington cash registers (but which complainant for want of knowledge is unable here to set forth); all of which false and unfair statements so then and there made to said Waycott being made for the purpose of trying to discredit Remington cash registers and of leading said Waycott to believe that they were not reliable but were worthless, and thereby trying to induce him to cancel his contract for his Remington cash register and to purchase a National cash register, all of which was said and done in willful violation of paragraphs A and K of said decree.

33 Defendant Aaron C. Sample

The defendant Aaron C. Sample, during the times he did the unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, was a salesman at Seatle, Wash., for National cash registers (under the authority of George H. Dowling, sales agent), for the National Cash Register Company.

(a) On or about June 4, 1923, Charles J. Darby, then a salesman for Remington cash registers at Bellingham, Wash., and surrounding territory, called on Gisher & Alderson, owners of a store at Birch Bay, Washington, for the purpose of trying to sell that firm a Remington cash register.

While said Darby was demonstrating a Remington cash register to said Gisher & Alderson, the defendant Aaron C. Sample, who had been following said Darby from place to place as he would call on different persons in an effort to sell them Remington cash registers, drove up to the place of business of said Gisher & Alderson, stopped his car, and went over to where said demonstration was being given and watched the demonstration for some time, then went into the store and talked to Lora C. Gisher, a member of said firm, in an effort to sell him a National cash register, and in the course of his conversation then and there stated to said Gisher, in substance, in the hearing of said Darby and said Alderson, among other things:

That Remington cash registers were made from a cast-off patent owned by the National Cash Register Company, which had
34 been discarded because it was regarded as being very unsatisfactory and impratical.

That the National Cash Register Company had been manufacturing cash registers for over 20 years, and therefore it should be a better register than the Remington.

That Remington cash registers would not do satisfactory work, and then and there made other similar remarks derogatory of Remington cash registers which were not clearly heard by said Darby.

That the defendant Sample in so following said Darby, salesman for Remington cash registers, from place to place was doing so for the purpose of ascertaining the persons upon whom said Darby was calling in his effort to sell Remington cash registers, and of then interfering with said Darby while attempting to sell his said cash registers, as he did so interfere with said Darby while he was demonstrating and attempting to sell a Remington cash register to said Gisher & Alderson, as above stated.

That the defendant Aaron C. Sample so followed said Darby from place to place, as above stated, and interfered with him while attempting to sell his cash registers, as aforesaid, and made the false and unfair statements respecting Remington cash registers to said Gisher, as aforesaid, for the purpose of thereby preventing said Darby from selling his cash registers and with a view of then selling such persons National cash registers, all of which was in willful violation of paragraphs B, J, and K of said decree.

35 Defendants Jerome B. Bliss, Norval F. Robbins

The defendant Jerome B. Bliss, during the times he did the unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, was sales agent at Pocatello, Idaho, and surrounding territory, for the National Cash Register Company, and therein engaged in selling National cash registers.

The defendant Norval F. Robbins, during the times he did the unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, was a salesman at Pocatello, Idaho, for National cash registers (under the authority of the defendant Jerome B. Bliss) for the National Cash Register Company.

(a) On or about May 25, 1923, L. Douglas McGhie, a salesman for Remington cash registers in that territory, sold to Clarence T. Stonebocker, owner of the Yellowstone service station at Rigby, Idaho, a Remington cash register for $260.00.

36 Some time thereafter (the precise date being unknown to complainant) the defendants Jerome B. Bliss, Norval F. Robbins, and Emanuel B. Peterson (said Peterson being then and there a salesman in said territory for Underwood typewriters) entered into a scheme to induce said Stonebocker, under the pretense that his said Remington cash register would not operate properly, to refuse to make his payments upon the purchase price of said cash register, return it to the Remington Cash Register Company, and to purchase a National cash register. In pursuance of the understanding between said defendants each of them did, from time to time, visit said Stonebocker, make remarks derogatory of Remington cash registers, and advise him to return it to the Remington Cash Register Company, some of said statements being, in substance, that Remington cash registers were rotten, that every Remington cash register placed by the Remington salesmen in that territory had given trouble, and

made other remarks of a similar nature respecting Remington cash registers.

Complainant avers that by reason of the reluctance and unwillingness of the said Clarence T. Stonebocker to state the times of said visits, and the statements made by said defendants to him upon those occasions—said Stonebocker, apparently, to a certain extent consenting to said scheme—it is not possible to set forth in detail, but only in a general way, the times of such visits and the nature and
37 substance of the statements so made to said Stonebocker by said defendants respecting Remington cash registers.

As a result of these visits to Stonebocker by said defendants, and of the false and the unfair statements so made to him, said Stonebocker, some time in August, 1923, signed a contract with the defendants Bliss and Robbins for the purchase of a National cash register, but the National Cash Register Company having been advised of the facts refused to approve the sale of such register.

Thereafter, in furtherance of said scheme, on or about December 1, 1923, the defendant Robbins again visited said Stonebocker, and it was then agreed between the said Robbins and said Stonebocker and one C. C. Christensen, then in the employ of said Stonebocker, that said Robbins would sell to said Stonebocker, in the name of said Christensen, a National cash register, which said Robbins then and there did, the understanding then being that said Stonebocker would receive and pay for said National cash register.

That said 1,000-line "Knocker" National cash register, so then sold to said Stonebocker in the name of C. C. Christensen, was received by said Stonebocker on or about February 6, 1924, and payments made thereon by said Stonebocker.

And thereupon, in pursuance of said agreement said Stonebocker shipped his said Remington cash register to the Remington Cash Register Company at Salt Lake City, on December 13, 1923, which said cash register was returned to said Stonebocker at Rigby, Idaho, on or about February 6, 1924.

38 Some time in January or February, 1924, E. R. Guyman, then a salesman for Remington cash registers in said territory, called on said Stonebocker at Rigby, Idaho, in an effort to adjust the trouble with respect to the Remington cash register, which said Stonebocker had so returned to the Remington Cash Register Company at Salt Lake City. As a result of his visit, said Stonebocker agreed to carry out his contract, said Guyman then leaving with said Stonebocker for his present use a loaned Remington cash register.

Returning shortly thereafter, said Guyman was advised by said Stonebocker that said defendant Bliss had in the meantime been to see him and had again, by means of the false and unfair statements, discouraged his carrying out his contract for said Remington cash register. Thereupon said Guyman at once drove to Pocatello, got a new Remington cash register, for which said Stonebocker

signed a new contract on March 18, 1924, the old Remington cash register being returned to the Remington Company.

After the installation of said new Remington cash register by said Stonebocker on March 18, 1924, the defendants Jerome B. Bliss, Norval F. Robbins, and Emanuel B. Peterson renewed their visits to Stonebocker in their efforts to induce him to cancel his contract for said Remington cash register. As a result of these visits the said Stonebocker refused to make further payments upon the purchase price of his Remington cash register so purchased by
39 him on March 18, 1924, and the same was retaken by said Remington Cash Register Company about October 1, 1924.

And in furtherance of said scheme and as a part of it, to which said Stonebocker was not an unwilling party, the said defendants, having so induced said Stonebocker to refuse to make payments upon his last-purchased Remington cash register, on or about August 6, 1924, sold to one E. J. Hill, for said Stonebocker, a 1,000-line "Knocker" National cash register, which said cash register was received by said Stonebocker on or about September 2, 1924, the purpose of making the contract for said National cash register in the name of E. J. Hill being to cover up the scheme and plan of said defendants and to make it appear that said Stonebocker had not purchased a National cash register.

All of said scheme and plan and statements of the defendants Bliss and Robbins, as aforesaid, being in willful violation of paragraphs A and K of said decree.

(b) About the month of August, 1923, Ray Mark, owner of Mark Brothers' service station, Twin Falls, Idaho, purchased through a Remington salesman a Remington cash register.

About the month of October, 1923 (the precise date being unknown to complainant), the defendants Jerome B. Bliss and Norval F. Robbins called at the place of business of said Ray Mark and without stating who they were then and there stated to said Mark, in substance:
40 "Where did you get that tin thing?" referring to his Remington cash register, which he then had in use in his said place of business, and then rapping the sides of said cash register further stating that said cash register was made out of tin, while National cash registers were strong and heavily constructed, and also then and there further stating, in substance, "Who will repair it (meaning his Remington cash register) when it goes bad? It is against the law for any National mechanic to touch it or repair it" and that the National Cash Register Company was the only company that had service men on the road who could repair their registers.

And also then and there further stating to said Mark that in every town they visited the parties who had Remington cash registers were taking them out and replacing them with National cash registers.

That remarks of the character of those described, derogatory of Remington cash registers, were kept up by said defendants Bliss

and Robbins for nearly an hour, until finally said Mark, becoming angry, stated to them that he did not care to hear any more talk of that character in his place of business.

That said statements so made by the defendants Jerome B. Bliss and Norval F. Robbins, derogatory of Remington cash registers, were willfully made for the purpose of trying to discredit said cash registers with a view to inducing said Mark to cancel his contract for it and to purchase a National cash register, and all of which was in willful violation of paragraphs A and K of said decree.

41 Defendants Jacob A. Goldman, Wilbur J. Long

The defendants Jacob A. Goldman and Wilbur J. Long, during the several times they did the unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, were salesmen at New Orleans, La., for National cash registers (under the authority of J. A. McLane, sales agent) for the National Cash Register Company.

(c) On or about October 16, 1924, J. D. LeBlanc, a merchant whose place of business is at 2401 Robert St., New Orleans, La., purchased through a Remington salesman a Remington cash register.

That a short time thereafter (the precise date being unknown to complainant) and several times thereafter the defendant Jacob A. Goldman called at the place of business of said LeBlanc, and upon being advised by said LeBlanc that he had purchased the Remington cash register then in his place of business said Goldman then and there stated, in substance, to said LeBlanc, that he had made a mistake in purchasing his Remington cash register, and proposed to said LeBlanc that he, said Goldman, would return to said LeBlanc the initial payment of $25.00 if he would return his Remington cash register and purchase a National cash register, which offer said LeBlanc refused.

Becoming tired of the repeated calls of said Goldman, in his efforts to induce him to cancel his contract for his Remington cash register, said Brennan finally asked said Goldman not to call again.

All of which conduct, calls, and statements made by said Goldman upon and to said LeBlanc were made for the purpose of trying to induce him to break his contract for his Remington cash register and to purchase a National, and all in willful violation of paragraphs A and K of said decree.

42 (e) On or about May 9, 1923, Morris Lakowisky, owner of a drug store at 632 Canal St., New Orleans, La., purchased through a Remington salesman a Remington cash register.

Shortly after he had purchased said Remington cash register (the precise date being unknown to complainant) the defendant Jacob A. Goldman called upon said Lakowisky, at his place of business, and then and there, among other things, stated, in substance, to said Lakowisky:

"I know that you bought a Remington register, but I just want to come in and convince you that you made a mistake; that the Rem-

ington Cash Register Company is a new concern; that they do not know anything about the cash-register business"; that he, said Goldman, could not see how the Remington Cash Register Company could possibly last; that it was impossible for that company to give further service, as they did not have the men to do it with; and that he, Lakowisky, would later realize that he had made a mistake in purchasing the Remington register, and that he, Goldman, would make him buy a National cash register.

That he could sell him, Lakowisky, a better cash register made by the National Cash Register Company for less money—for $70.00—and that it was as good a register as the Remington Company could sell, and then and there left circulars respecting National cash registers with said Lakowisky, all of which things were said and done by the said Goldman for the purpose of discrediting Remington cash registers and to induce said Lakowisky to break his contract for his Remington cash register and to purchase a National cash register, and all were in willful violation of paragraphs A and K of said decree.

(f) On or about April 19, 1923, Marco Grisoli, doing business at 3210 Bank Street, New Orleans, La., purchased through a Remington salesman a Remington cash register for $250.00, being allowed $50.00 for an old National register taken in on an exchange.

43 On or about April 23, 1923, the defendant Jacob A. Goldman, with two other salesmen for National cash registers, called on said Grisoli, and upon being advised by said Grisoli that he had purchased of James Cocke and L. Calderone a Remington cash register, said defendant Goldman then and there, among other things, stated, in substance, to said Grisoli:

That said Cocke was not an authorized selling agent for Remington cash registers, and that the order which he had signed for the Remington cash register was not valid, since no money had been paid.

That said Goldman also then and there spoke very disparagingly of Remington cash registers, and pointed out to said Grisoli what he claimed to be weaknesses of Remington cash registers, and then and there stated to said Grisoli if he would cancel his order for his Remington cash register and purchase a National cash register he, said Goldman, would allow him $75.00 for his old National register.

As a result of such false and unfair statements, and such unfair conduct upon the part of said Goldman, he then and there induced said Grisoli to break his contract for his Remington cash register and signed a contract for the purchase of a National cash register.

All of which things so said and done by said Goldman, as above stated, were in willful violation of paragraphs A and K of said decree.

44 Defendants Jacob A. Goldman, Louis J. Desmare

The defendants Jacob A. Goldman and Louis J. Desmare, during the several times they did the unfair things and made the false and unfair statements respecting Remington cash registers, as now here

charged, were salesmen at New Orleans, La., for National cash registers (under the authority of J. A. McLane, sales agent) for the National Cash Register Company.

(a) On or about September 9, 1923, Paul G. Weilbaecher, a druggist at 741 Broad St., New Orleans, La., purchased through a Remington salesman a Remington cash register.

A few days thereafter (the precise date being unknown to complainant) the defendant Jacob A. Goldman came into the place of business of said Weilbaecher, and being then and there advised by said Weilbaecher that he had purchased the Remington cash register then in his place of business then and there stated to said Weilbaecher, in substance, among other things:

That for $225 he could sell him a National cash register that would do the same work as the Remington and give him better service. That the next day after said Goldman had so visited the place of business of said Weilbaecher, as above stated, the defendants Jacob A. Goldman and Louis J. Desmare called at his place of business, and said Desmare then and there, among other things, stated to said Weilbaecher, in substance:

"Why, Paul, I am surprised to see you have bought a Remington. Why did you do it?" To which said Weilbaecher replied that both he and his wife were familiar with the National cash register, since they had owned one, and that they found the Remington cash register much better in every respect.

45 That thereupon said Desmare then stated to said Weilbaecher, in substance, that said Goldman had made a mistake in telling him that the National Cash Register could sell him for $225.00 a cash register that would do the same work and give better service than the Remington register; that he, said Desmare, would sell him a cash register for $100.00 that would do the same work and give much better service than his Remington, provided he could get the Remington salesman, Mr. Calderone, to release him from his contract for the purchase of his Remington cash register and take it back, which offer said Weilbaecher then and there refused.

Thereupon said Desmare further stated to said Weilbaecher, in substance, "You have got a guarantee on that Remington register for one year. But what guarantee have you got that it will last longer than a year?" And that thereupon said Desmare repeated his offer to sell said Weilbaecher for $100.00 a National cash register that would do identically the same work as his Remington and give him much better service, provided Mr. Calderone would take away the Remington cash register so purchased by said Weilbaecher.

All of which things were so said and done by the said Goldman and the said Desmare in willful violation of paragraphs A and K of said decree.

46 Defendant Clem Miner

The defendant Clem Miner, during the times he did the unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, was a salesman for National

cash registers at Des Moines, Iowa, for the National Cash Register Company.

(a) On or about April 25, 1924, R. L. Faubion and M. L. Thompson, then salesmen for Remington cash registers at Des Moines, Iowa, called at the place of business of C. R. Schilling, a grocer at 23rd and Clark Streets, in said city, for the purpose of trying to sell him a Remington cash register.

While said Faubion and said Thompson were so demonstrating their said Remington cash register to said C. R. Schilling, the defendant Clem Miner, who apparently had been following said Faubion and said Thompson, came into said place of business and without invitation proceeded to criticize Remington cash registers and to extol the merits of National cash registers.

47 In addition to interrupting the demonstration then being made by said Faubion and said Thompson, and to the statements he then made derogatory of Remington cash registers (said statements not being within the knowledge of complainant are not here set forth), said Miner, as a further means of preventing said Schilling from purchasing a Remington cash register, then and there said to said Schilling, in substance, that he would sell him a better and more complete National cash register than the Remington cash register then being demonstrated to said Schilling for the sum of $215.00, plus his old National cash register, which sum was much less than the price of the Remington cash register then being demonstrated to him, and invited said Schilling down to the National cash register office, in said city, where he would show him said cash register.

Shortly thereafter said Schilling did visit said office of the National Cash Register Company in Des Moines for the purpose of seeing the cash register the said Miner offered to sell him for $215.00 and his old cash register, but while there said Miner failed to show said Schilling said cash register, and thereupon said Schilling later purchased said Remington cash register, paying therefor $375.00, he being allowed $75.00 for his old National cash register in the exchange.

That said Miner in so interfering with said salesmen for Remington cash registers, as above stated, and in so offering to sell
48 said Schilling a better National cash register for $215.00, and in making the false and unfair statements respecting Remington cash registers, did so willfully and for the purpose of unfairly trying to prevent said Schilling from purchasing a Remington cash register, and that said Miner, at the time he so offered to sell said Schilling a better National cash register for $215.00, as above stated, had no intention of doing so, all of said acts and conduct of the said Clem Miner being in willful violation of paragraphs B, J, and K of said decree.

(b) On or about April 14, 1924, R. L. Faubion and M. L. Thompson, then salesmen at Des Moines, Iowa, for Remington cash registers, visited the place of business of William E. Henry, a druggist

at 2414 University Avenue, Des Moines, Iowa, for the purpose of trying to sell him a Remington cash register.

While they were demonstrating their Remington cash register to said Henry at their car in front of his place of business in said city, the defendant Clem Miner and another salesman with him, whose name was believed to be Putnam, and who apparently had been spying upon them and following them for the purpose of ascertaining the places and the names of the persons upon whom said Faubion and said Thompson were calling in their efforts to sell Remington cash registers, stopped at the place of business of the said Henry and seeing said Faubion and said Thompson so then demonstrating their said cash register thereupon entered the place of business
49 of said Henry and induced the clerk then at the soda fountain in said place of business to come out to where they were so demonstrating their said cash register to said Henry, and say to said Henry that he was then wanted in his place of business; and said Henry then and there believing that he was wanted, in good faith, in his place of business went back into it, whereupon said Miner and said Putnam then proceeded to try to sell said Henry a National cash register, and said Faubion and said Thompson thereafter were unable to complete their demonstration of their cash register to said Henry.

That said Miner and said Putnam so followed and spied upon said Faubion and said Thompson and so interfered with their said demonstration to said Henry, as above stated, for the purpose of interfering with and preventing them from making sales of Remington cash registers, and especially of interfering with them in their efforts to sell a Remington cash register to said Henry, all of which was in willful violation of paragraphs B, J, and K of said decree.

Defendants Edward H. Schmeiding, Fred I. Schmeiding, William S. Clark

The defendant Edward H. Schmeiding, at the times he did the unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, was sales agent at Canton, Ohio, for the National Cash Register Company and engaged in selling the cash registers of that company at Canton, Ohio, and the surrounding territory.

The defendants Fred I. Schmeiding and William S. Clark, at the times they did the unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, were salesmen at Canton, Ohio, for National cash registers (under the authority of the defendant Edward H. Schmeiding) for the National Cash Register Company.

50 Defendant Fred I. Schmeiding

(d) On or about the 3rd day of February, 1924, D. S. Gerber, owner of the "Betty Jane Sweet Shop," 3003 West Tuscarawas St.,

Canton, Ohio, purchased through a Remington salesman a Remington cash register.

Some time thereafter (the precise dates being unknown to complainant), and upon three or four different dates the defendant Fred I. Schmeiding called at the place of business of said Gerber and with full knowledge of the fact that he had purchased and was then using a Remington cash register and did not desire to purchase another cash register then and there, upon such occasions, stated to said D. S. Gerber and to his wife, Mrs. D. S. Gerber, in substance, among other things, that:

Remington cash registers were defective, were no good, and would not render purchasers good service; that the National Cash Register Company was the only company that made a good cash register; that the Remington Cash Register Company was not a reliable company and its guarantee of its registers was of no value; and upon such several visits made other and similar statements derogatory of the Remington Cash Register Company and Remington cash registers, all for the purpose of attempting to discredit said company and its cash registers and to lead said Gerber to believe that his Remington cash register was of but little value, that he had been deceived when he purchased it, and thereby trying to induce him to cancel his contract for his Remington cash register and purchase of said defendant a National cash register, all of which statements by the said Fred I. Schmeiding to the said D. S. Gerber and his wife being false or unfair and in willful violation of paragraphs A and K of said decree.

51 Defendant Chester C. Hixenbaugh

The defendant Chester C. Hixenbaugh, during the times he did the unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, was a salesman at Pittsburgh, Penna., for National cash registers (under the authority of H. O. Whipple, sales agent) for the National Cash Register Company.

(a) On or about February 9, 1923, Peter E. Yeager, a druggist at 2302 Arlington Avenue, Pittsburgh, Pa., purchased through a Remington salesman a Remington cash register.

Within some two or three weeks thereafter (the precise date being unknown to complainant) the defendant Chester C. Hixenbaugh entered the place of business of said Yeager for the purpose of trying to sell him a National cash register. Being then and there advised by said Yeager that he had purchased a Remington cash register and did not desire another register, said Hixenbaugh then and there, among other things, stated, in substance, to said Yeager:

That the Remington cash register which he had purchased was a piece of "junk," and that he, said Hixenbaugh, could have sold him a better cash register for less money, or one equally as good as the Remington for $75.00 less in price.

That dirt would get into the mechanism of Remington cash registers through the opening around the central detail strip and soon cause the register to become inoperative, due to corrosion of the register, that there was nothing new in the Remington cash register, and that its features had been discarded many years before by the National Cash Register Company, and then and there made to said Yeager other similar statements derogatory of Remington cash registers.

That said statements so made by said Hixenbaugh to said Yeager respecting Remington cash registers, above set forth, were
52 false or unfair, and were made for the purpose of discrediting such cash registers and of leading said Yeager to believe that they were not efficient, and thereby to induce said Yeager to cancel his contract for the purchase of his Remington cash register and to purchase of him, said Hixenbaugh, a National cash register, all in willful violation of paragraphs A and K of said decree.

Defendant Harry L. Dubel

The defendant Harry L. Dubel, at the times he did the unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, was a salesman at Philadelphia, Penna., for National cash registers (under the authority of John T. Watson, sales agent) for the National Cash Register Company.

(a) On or about September 18, 1923, Morris R. Kerst, owner of a market stand at 822 Reading Terminal Market, Philadelphia, Penna., purchased through a Remington salesman a Remington cash register.

On or about September 21, 1923 (the precise date being unknown to complainant), the defendant Harry L. Dubel called at the place of business of said Kerst for the purpose of trying to sell him a National cash register. Being then and there advised by said Kerst that he had purchased the Remington cash register then in use in his place of business, said Dubel then and there, among other things, stated, in substance, to said Kerst:

That when he purchased his Remington cash register he had got "stuck," that the Remington Cash Register Company had been in business but a year and was not a responsible company, and that Remington cash registers were pieces of junk.

That he, said Dubel, knew of three places where purchasers of Remington cash registers would sell them for 50 cents on the
53 dollar, and that he would have continual trouble with the Remington cash register as long as he kept it.

And also at that time called the attention of said Kerst to a pamphlet showing the various types of National cash registers, and particularly to a cash register known as the 1,000-line "Knocker" register, which he, Dubel, marked, and on which he fixed a price of

$250.00 for which he would sell said cash register to said Kerst, said Kerst having paid $325.00 for his Remington cash register.

That several times thereafter (the precise dates being unknown to complainant) the defendant Dubel called upon said Kerst at his place of business and repeated the statements derogatory of Remington cash registers and of the Remington Cash Register Company herein above set forth.

All of said statements so made by said Dubel to said Kerst, above set forth, were false or unfair and were made for the purpose of discrediting Remington cash registers and of prejudicing said Kerst against them, and by such means trying to induce him to break his contract for the purchase of his Remington cash register and then to purchase of him, said Dubel, a National cash register, all of such acts and statements of the said Dubel being in willful violation of paragraphs A and K of said decree.

54 Defendant Robert J. Kavelage

The defendant Robert J. Kavelage, during the times he did the unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, was a salesman at Syracuse, New York, and surrounding territory, for National cash registers (under the authority of C. A. Sager, sales agent) for the National Cash Register Company.

(a) For some time prior to July 6, 1923, J. M. Woods and John Weil, conducting a grocery under the firm name of Woods & Weil, at 927 Onondaga Ave., Syracuse, New York, were contemplating the purchase of a cash register. Prior to said date the defendant and the salesman for Remington cash registers had each demonstrated to said Woods & Weil the merits of their respective cash registers.

Having been advised by said Woods & Weil that they had investigated the Remington cash register and were thinking of purchasing one, said Kavelage, upon two different occasions (the precise dates being unknown to complainant), stated to said Woods and to said Weil, in substance, among other things:

That Remington cash registers were not good registers, that he could take them to a large number of places where merchants who had purchased Remington cash registers were dissatisfied with them and were having trouble with them, that dirt would get down through the opening of the detail strip and block the mechanism of the register and render it impossible of operation, as a result of which said Woods became skeptical of Remington cash registers and called on the salesman for Remington cash registers to know if the statements made by said Kavelage were true. Being satisfied with the statements made to them by said Remington salesman, the firm thereupon purchased through said salesman a Remington cash register, which was delivered to them on or about July 6, 1923.

Shortly after the delivery to them of said cash register (the
55 precise date being unknown to complainant) the defendant Kavelage again called at the place of business of said Woods & Weil, and being then advised that they had purchased the Remington cash register then in use in their place of business said Kavelage again, among other things, stated to said Woods and to said Weil, in substance, in addition to the statements he had theretofore made to them derogatory of Remington cash registers:

That it was too bad they had bought the Remington cash register, for he could have gotten them a Remington cash register from a dissatisfied user for the amount of the unpaid balance upon it, and again told them, among other things, that dirt would get down into the mechanism of the register through the opening around the detail strip and block the mechanism of the register so that it would not operate, and that purchasers who had bought them were dissatisfied with them because they would not operate properly, all for the purpose of again attempting to discredit Remington cash registers and thereby dissatisfy said Woods & Weil with their said cash register, so that they would cancel their contract, return their register to the Remington Cash Register Company, and purchase a National cash register of him, said Kavelage, all of which conduct and statements of the said Kavelage being in willful violation of paragraphs A and K of said decree.

(b) On or about July 28, 1922, Frank J. Welch, a grocer at 1427 Milton Avenue, Solvay, New York, purchased through a
56 Remington salesman a Remington cash register, said register being delivered on or about September 20, 1922.

On or about February 8, 1923, the defendant Robert J. Kavelage called at the place of business of said Welch and after being advised by said Welch that he had purchased the Remington cash register then in use in his place of business then and there, among other things, stated, in substance, to said Welch:

That the majority of Remington cash registers did not add properly, and that that was true of no other cash register upon the market.

That Remington cash registers were great accumulators of dust, which entered through the autographic slot in the glass, and that in the course of time this would cause the register to gum up to such an extent that it would become inoperative.

That the flexible keyboard on Remington cash registers was impractical, as it required an expert touch, and that users of Remington cash registers were having serious trouble because the clerks could not be taught this sensitive touch.

That the key on the receiving drum of the detail strip frequently works out and falls down into the mechanism, completely tying up the register and requiring the services of a repairman to put it in working order.

And then and there made other similar statements derogatory of Remington cash registers to said Welch, all for the purpose of
57 trying to discredit such cash registers and thereby to dissatisfy said Welch with his said cash register and to induce him to cancel his contract for his said cash register, return it to the company, and purchase of him, said Kavelage, a National cash register, all of which statements being false or unfair and in willful violation of paragraphs A and K of said decree.

Defendant Harvey S. Crocker

The defendant Harvey S. Crocker, at the times he did the unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, was a salesman at Boston, Mass., for National cash registers (under the authority of Fred S. High, sales agent) for the National Cash Register Company.

(a) On or about December 8, 1922, Edward J. Morse, owner of a garage at 82 Prentice St., Boston, Mass., purchased through a Remington salesman a Remington cash register, the register being delivered on or about January 24, 1923.

On or about March 1, 1923 (the precise date being unknown to complainant), the defendant Harvey S. Crocker called at the place of business of said Morse and upon seeing therein a Remington cash register then and there, among other things, stated in substance, to said Morse:

"Why in the hell did you buy that thing for?" To which Morse responded that it was a good register and he was satisfied with it, whereupon Crocker replied:

"It is no damn good."

58 That the Remington Cash Register Company was a young concern and could not remain in business long, and then he would be unable to get any service on the register.

That dirt and lint from the detail strip would get into the mechanism and disable the register and that he would probably use it a month.

That if he, said Morse, would send his Remington cash register back to the Remington Cash Register Company he would sell him a National cash register and that all he would lose would be his initial payment on the Remington.

That Morse then asked said Crocker what he would allow him for his Remington register on a purchase of a National cash register, to which said Crocker replied that the Remington cash register did not have much value and that their one object in taking them in trade on a National cash register was to get the Remington cash register off of the market, and also on four or five later occasions said Crocker called at the place of business of said Morse and made similar statements derogatory of Remington cash registers, all of which statements and conduct on the part of said Crocker being for

the purpose of trying to discredit Remington cash registers, to dissatisfy said Morse with his Remington cash register, and thereby to induce him to cancel his contract for his Remington cash register and to purchase of said Crocker a National cash register, and all in willful violation of paragraphs A and K of said decree.

59 (b) On or about March 9, 1923, William W. Volk, then a salesman for Remington cash registers, entered the place of business of William H. Baker and Daniel E. Carroll, then conducting a lunch room at 2376 Massachusetts Ave., Cambridge, Mass., for the purpose of trying to sell them a Remington cash register.

While said Volk was so engaged in making to said Baker and said Carroll a demonstration of his said cash register, the defendant Harvey S. Crocker, who, apparently, had been spying upon the movements of said Volk and following him from place to place as he was engaged in looking for purchasers of his cash registers, entered the place of business of said Baker and said Carroll, and without invitation interrupted said demonstration and proceeded to take part therein and to make remarks to said Baker and said Carroll derogatory of Remington cash registers, then and there saying to them, in substance, among other things:

That if they, said Baker and said Carroll, purchased a Remington cash register they would be much dissatisfied with it, that Remington cash registers would not stand up, that they were a pile of junk, and that he could take them to a store on Massachusetts Avenue in Cambridge and show them a Remington purchaser who was very much dissatisfied with his Remington cash register, and also then and there made other remarks derogatory of Remington cash registers.

Having revealed his identity, said Volk called the attention
60 of said Crocker to the decree heretofore set out in this complaint and asked said Crocker to leave the store until he, said Volk, had completed his demonstration, which said Crocker did.

Before said Volk had completed his demonstration, as above stated, said Crocker returned and again interfered and renewed his remarks derogatory of Remington cash registers and was again invited to leave the store, which he did.

And said Volk, having then and there sold to said Baker and said Carroll a Remington cash register and received from them a signed order and a cash payment, left their place of business.

As soon as said Volk had left said place of business, the defendant Crocker entered and upon being advised that they, said Baker and said Carroll, had signed a contract for a Remington cash register then and there made to said Baker and said Carroll further remarks derogatory of Remington cash registers, stating, in substance, among other things:

That Remington cash registers were a pile of junk, that they would not stand up, that the adding wheels could be turned back without the use of the master key, that purchasers of Remington cash registers were dissatisfied with them, and then and there offered to repair for

said firm, free of charge, a small National cash register which they had traded in to said Volk as part payment of the purchase price of said Remington cash register if they would purchase a National cash register and stop using the Remington cash register.

61 And thereafter, on at least two occasions (the dates thereof being unknown to complainant), the said Crocker again entered the place of business of said Baker and said Carroll and again repeated the statements above set out derogatory of Remington cash registers.

That the defendant Harvey S. Crocker did the things and made the statements to said Baker and said Carroll, above set out, in the first instance for the purpose of trying to prevent them from purchasing a Remington cash register, and after they had so purchased said cash register of trying to discredit it and to lead them to believe that said cash register was not reliable and was of but little value as a cash register, and thereby to cause them to cancel their contract for their said Remington cash register and to purchase of him, said Crocker, a National cash register, all of said conduct and statements of said Crocker, as above charged, being false or unfair and in willful violation of paragraphs A, B, J, and K of said decree.

(c) On or about March 9, 1923, and upon the date on which he had made his demonstration of a Remington cash register and had sold one to said Wm. H. Baker and Daniel E. Carroll, as set out in paragraph (b), last above set out, said William W. Volk, said salesman for Remington cash registers, after leaving the place of business of said Baker and said Carroll at 2376 Massachusetts Ave., Cambridge, Mass., proceeded to the place of business of one

62 Daniel J. Munyon, at 169 Huron St., Cambridge, Mass., a distance of about two miles from the place of business of said Baker and said Carroll, with whom he had an appointment to demonstrate to said Munyon a Remington cash register.

While he was so engaged on said date in making a demonstration to said Munyon of a Remington cash register, the defendant Harvey S. Crocker, who had been spying upon and following him, said Volk, appeared at the place of business of said Munyon and interrupted said demonstration.

That thereupon said Volk accused said Crocker of following him as he was engaged in trying to sell Remington cash registers, reminded him of the provisions of said decree heretofore set out in this complaint, and asked him to leave the place of business of said Munyon until he, said Volk, had finished his demonstration of his Remington cash register to said Munyon, which he refused to do.

And thereupon said Crocker, in the presence of said Volk, and while said Volk was so demonstrating his Remington cash register to said Munyon, then and there, among other things, stated, in substance, to said Munyon:

That Remington cash registers were mechanically wrong; that they would not stand up; that dirt would get into the mechanism of

the register through the opening in the detail strip and block the mechanism so that the register would not operate; that the Remington Cash Register Company would probably not be selling cash registers within a year and that then a purchaser would be
63 unable to get service if his cash register got out of order, and that he would be unable to get paper for them; and that if he, said Munyon, bought a Remington cash register he would become dissatisfied with it, as he could name several instances where purchasers became dissatisfied with Remington cash registers; and then and there made other similar statements derogatory of Remington cash registers.

That said statements so made by said Crocker to said Munyon respecting Remington cash registers were false or unfair and were made for the purpose of trying to prevent said Munyon from purchasing a Remington cash register in order that he, said Crocker, might sell him a National cash register, all of which conduct and statements of the said Harvey S. Crocker being in willful violation of paragraphs B, J, and K of said decree.

Defendant Charles R. Moore

The defendant Charles R. Moore, at the times he did the unfair things and made the false and unfair statements respecting Remington cash registers, as now here charged, was a salesman at Boston, Mass., and surrounding territory, for National cash registers (under the authority of Fred S. High, sales agent) for the National Cash Register Company.

(a) Some time in June, 1923, Mrs. Mabel J. Stoddard, then owner of a confectionary and bake shop at 8 Central Avenue, Hyde Park, Mass., purchased through Sidney Z. Charak, a Remington salesman, a Remington cash register, which was installed at her place of business by said Charak about July 2, 1923.

While said Charak was so installing said Remington cash register in the place of business of Mabel J. Stoddard, as above stated, the defendant Charles R. Moore entered said place of business and without stating who he was stated, in substance, to said
64 Charak: "Why don't you sell a good register, and why don't you work for a good company?"

And then stated to said Mabel J. Stoddard, in substance, "Why don't you buy a good cash register? I can show you many Remington cash registers that are under the counter and not in use."

And thereupon said Charak, having by that time learned that said Moore was a salesman for National cash registers, then accused said Moore of having, on or about that date, entered the place of business of Cafarella Brothers, then owner of a Remington cash register then in use in their place of business at 21 Fairmont Ave., Hyde Park, Mass., and having then and there stated to said Cafarella Brothers, in substance, among other things:

That a good many people who had bought Remington cash registers were dissatisfied with them, and that of his own personal knowl-

edge he knew several merchants who had bought Remington cash registers and would not use them but were using National cash registers instead and that the Remington cash registers were lying on the floor; and

That it was very easy for money to slip through the opening in the glass on the detail strip of a Remington cash register, thereby falling down into the machinery and putting the register out of commission, and in reply to said accusation said Moore then and there admitted to said Charak, in the presence of said Mabel J. Stoddard, that he had made said statements to said Cafarella Brothers, and that he could make a good many more remarks discrediting Remington cash registers if he wanted to; that he had a right to say anything that was true, and that he could say a great deal more if he wanted to.

And then and there also stated, in substance, to said Mrs. Mabel J. Stoddard:

"I can take you right now to places where I can prove what I say, and if I did you would not want that register in your place," and further, that money would drop through the key slots and block the mechanism and that he could take her to a place at Reedville where a half dollar got in the key slots and locked the cash register, and then and there made other similar statements to her derogatory of Remington cash registers.

That said statements so made by said Moore to said Mrs. Mabel J. Stoddard and to said Charak were false or unfair and were made by said Moore for the purpose of trying to discredit Remington cash registers and thereby to try to induce said Mabel J. Stoddard to cancel her contract for her Remington cash register and to purchase of him, said Moore, a National cash register, all of which statements and conduct of the said defendant Charles R. Moore, above set forth, being in willful violation of paragraphs A and K of said decree.

Wherefore complainant again avers and charges that the several persons named as defendants herein, to wit, Calvin U. Whiffen, Herman Oelschlager, Daniel P. Hendrickson, E. Conant Livingston, E. Murray Aerenschield, Paul G. Boehm, George H. Flaherty, Hugh B. Scott, Herman L. Barker, Alfred D. Evers, Joseph D. Myers, Ralph C. Brown, Leslie Claus, John A. Campbell, Robert A. Morris, Cornelius Penworthy, William B. Rich, John D. Cardall, Herman W. Meyers, Harry A. Barnes, George F. Finnegan, Lemuel E. Bell, George E. Baudrand, Charles S. Fortune, George D. Daum, Arnold L. Wood, Frank A. Grady, Richard Ward, Jack Fogarty, Edward W. Tillson, Stanley E. Stout, George J. McCarthy, William E. Zimmerman, Howard T. Bennett, William C. Bryant, Edmund A. Peiser, Aaron C. Sample, Jerome B. Bliss, Norval F. Robbins, Emanuel B. Peterson, Lester H. Bolte, Leroy Lynch, Thomas W. McCue, Jacob A. Goldman, Wilbur J. Long, Louis J. Desmare, Neven C. Hawthorn, Coman Norton, John T. Collins, John G. Shankle, Goldwin Smith, Clem Miner, Stephen L. Perry, David R. Crandall, Clarence J. Ramspott, Hugh Montgomery, Cletus C. Deardorf, John A. Muldoon, Ray V. Sullivan,

Edward L. Blake, Walter D. Young, Henry C. Cook, Frank E. O'Connor, George A. Baker, Walter M. Stearns, Nathan H. Wetstein, Eugene L. Gleason, Edward H. Schmeiding, Fred. I. Schmeiding, William S. Clark, Harry A. Wackerly, Leo J. McCoy, Marquette Lane, Nathan W. Dubbs, Chester C. Hixenbaugh, John A. Hickey, Harry L. Dubel, Richard J. Brace, Joseph H. Hall, Joseph B. Cummins, Philip J. Seibert, Harlow E. Johnson, Max Peller, John W. Poppenberg, jr., Robert J. Kavelage, Harvey S. Crocker, Charles T. Walsh, Lawton J. Boudreau, Charles R. Moore, Barby G. Welton, Edward T. Balfrey, and Harold V. O'Bryan, severally, have wilfully, wrongfully, and knowingly disobeyed and violated the
67 provisions of the final decree entered by this court on February 1, 1916, in said Equity Cause No. 6802, heretofore herein set forth, in the manner, by the means, and for the purposes, as charged herein; and prays that an order issue from this court upon this information, directing and requiring said defendants, and each of them, to appear before this court at a time to be fixed in said order, to show cause, if any there be, why they should not be attached and brought before the court for hearing and punishment.

That upon the hearing of this information that said defendants and each of them be held and adjudged guilty of contempt of the former order of this court as heretofore herein charged, and that the court impose upon each of them such punishment as to it may seem just and proper, and that the court from time to time will make such further orders herein as may be necessary to carry into effect all judgments and orders entered by this court in this proceeding.

HAVETH E. MAU,
United States Attorney.

WILLIAM D. MITCHELL,
Acting Attorney General.
WILLIAM J. DONOVAN,
Assistant to the Attorney General.
ABRAM F. MYERS,
JAMES A. FOWLER,
JOHN L. LOTT,
Special Assistants to the Attorney General.

68 THE UNITED STATES OF AMERICA,
District of Columbia, ss:

Before me the subscriber, a notary public within and for the District of Columbia, personally came John L. Lott, who, being by me first duly sworn according to law, says that he is a duly appointed, qualified, and acting special assistant to the Attorney General of the United States in the Department of Justice.

That he, by direction of his superior officer, caused a careful investigation to be made by the special agents of the Department of Justice into the charges of the alleged violation, by salesmen and other persons engaged in the sale of National cash registers through-

out the United States for the National Cash Register Company, of the provisions of the final decree entered in the District Court of the United States for the Southern District of Ohio, Western Division, on February 1, 1916, in Equity Cause No. 6802, entitled The United States of America, plaintiff, v. The National Cash Register Company et al., defendants, and especially of the charges that the persons named as defendants in the foregoing information had violated the provisions of said decree.

That the foregoing information is based upon and drafted from the matters and documents set forth in and attached to the reports, made under their oath of office, of the special agents of the Department of Justice charged with the duty of making the investigation ordered to be made in this matter, which information and
69 documents were obtained by said special agents from merchants and other persons having personal knowledge of the matters they so reported to said agents, and which said agents embodied in their several reports to this department.

That he has carefully read all of the reports so made by said special agents to the department in this matter; that he has also carefully read the foregoing information; and that from the knowledge he has thus acquired of the matters and things charged therein he believes that the matters and things severally charged against the several persons named as defendants therein are true.

JOHN L. LOTT.

Sworn to before me and subscribed in my presence this 27th day of October, A. D. 1925.

[SEAL.] CHAS. B. SORNBORGER,
Notary Public, District of Columbia.

70 In United States District Court

[Title omitted.]

Motion for a rule to show cause

Filed Nov. 2, 1925

Now comes the United States of America, complainant, and moves the court for a rule upon the above-named defendants, commanding and requiring them and each of them, on or before a day to be fixed in said rule, to show cause why they and each of them should not be adjudged to be in contempt of this court for having violated the injunction ordered and issued by this court on February 1, 1916, in Equity Cause No. 6802, entitled "The United States of
71 America, plaintiff, v. The National Cash Register Company et al.," then and now pending in this court, and be attached and punished for the same, as prayed in the information filed in this proceeding.

HAVETH E. MAU,
United States Attorney.

72 In United States District Court

[Title omitted.]

Order for a rule to show cause

Nov. 2, 1925

Upon motion of the complainant, and good cause being shown, it is ordered that a rule be issued on the defendants, Calvin U. Whiffen, Herman Oelschlager, Daniel P. Hendrickson, E. Conant Livingston, E. Murray Aerenschield, Paul G. Boehm, George H. Flaherty, Hugh B. Scott, Herman L. Barker, Alfred D. Evers, Joseph D. Myers,
73 Ralph C. Brown, Leslie Claus, John A. Campbell, Robert A. Morris, Cornelius Penberthy, William B. Rich, John D. Cardall, Herman W. Meyers, Harry A. Barnes, George F. Finnegan, Lemuel E. Bell, George E. Baudrand, Charles S. Fortune, George D. Daum, Arnold L. Wood, Frank A. Grady, Richard Ward, Jack Fogarty, Edward W. Tillson, Stanley E. Stout, George J. McCarthy, William E. Zimmerman, Howard T. Bennett, William C. Bryant, Edmund A. Peiser, Aaron C. Sample, Jerome B. Bliss, Norval F. Robbins, Emanuel B. Peterson, Lester H. Bolte, Leroy Lynch, Thomas W. McCue, Jacob A. Goldman, Wilbur J. Long, Louis J. Desmare, Neven C. Hawthorn, Coman Norton, John T. Collins, John G. Shankle, Goldwin Smith, Clem Miner, Stephen L. Perry, David R. Crandall, Clarence J. Ramspott, Hugh Montgomery, Cletus C. Deardorf, John A. Muldoon, Ray V. Sullivan, Edward L. Blake, Walter D. Young, Henry C. Cook, Frank E. O'Connor, George A. Baker, Walter M. Stearns, Nathan H. Wetstein, Eugene L. Gleason, Edward H. Schmeiding, Fred I. Schmeiding, William S. Clark, Harry A. Wackerly, Leo J. McCoy, Marquette Lane, Nathan W. Dubbs, Chester C. Hixenbaugh, John A. Hickey, Harry L. Dubel, Richard J. Brace, Joseph H. Hall, Joseph B. Cummins, Philip J. Seibert, Harlow E. Johnson, Max Peller, John W. Poppenberg, jr., Robert J. Kavelage, Harvey S. Crocker, Charles T. Walsh, Lawton J. Boudreau, Charles R. Moore, Barby G. Welton, Edward T. Baltrey, and Harold V. O'Bryan, commanding and requiring them and each of them to be and appear before this court, in person or by counsel, in the Federal Building, at Cincinnati, Ohio, on Tuesday, December 15, 1925, at 10 o'clock, a. m., central standard time, to show cause, if any there be, why they and each of them should not be adjudged to be in contempt of the former order of this court for having violated the provisions of the injunction heretofore ordered and issued by this court on February 1, 1916, in Equity Cause No.
74 6802, entitled "The United States of America, plaintiff, v. The National Cash Register Company et als., defendants," then and now pending in this court, and be attached and punished for the same: Provided, That a copy of such rule and of the information filed in this proceeding be served personally upon said defendants on or before November 14, 1925; but with respect to defendants not so served on or before said date that each be and

appear before this court at the place and hour named on or before thirty days after a copy of such rule and of such information shall be served personally upon them.

SMITH HICKENLOOPER,
NOVEMBER 2ND, 1925. *District Judge.*

75 In United States District Court

[Title omitted.]

Plea of not guilty

Filed Feb. 15, 1926

Now comes the defendant Jacob A. Goldman and respectfully enters a plea of "not guilty" to each and all of the charges against him, as contained in the information filed in the above cause.

J. A. GOLDMAN.

NOTE.—The record contains an identical plea of "not guilty" by each of the other defendants in error. These are contained in the record under the following dates: Filed February 15, 1926.—Goldman, Desmare, Miner, Hixenbaugh, Kavelage, Sample, Oelschlager, Crocker, Fogarty, Dubel, Bliss, Livingston, Aerenschield, and Moore. Filed February 17, 1926.—Hendrickson, Flaherty, and Myers. Filed March 27, 1926.—F. I. Schmeiding.

76 In United States District Court

[Title omitted.]

Order to take testimony

Mar. 1, 1926

This day this cause came on to be heard on the question of the taking of testimony herein, and all parties being present by counsel, and the court having given due consideration to the same, it is hereby ordered as follows:

1. That B. M. Colling be, and she hereby is, appointed as a special examiner to take, transcribe, and report to this court such testimony as the parties hereto may desire to offer before her, in the following States: North Carolina, Florida, Louisiana, Texas, Arizona, California, Oregon, Washington, Idaho, Montana, Utah, Colorado, and Nebraska.

2. Said special examiner is hereby authorized and empowered to fix the times and places for hearings, to adjourn the same from time to time, to cause subpœnas and subpœnas duces tecum to be issued for witnesses, to administer oaths to witnesses, and to certify the testimony to the court when transcribed by her.

77 3. The special examiner shall be allowed compensation in an amount to be fixed by the court from time to time, which allowance shall include her actual expenses incurred in the performance of her duties and the charges for transcribing the testimony.

4. That the compensation allowed to said special examiner by the court and the costs and expenses incurred by her and allowed by the court shall in the first instance be paid one-half (½) by the complainant and the other half by or on behalf of the defendants, the final determination of the liability of the parties for the payment thereof to await the judgment of the court.

5. The special examiner is further authorized, at the request of the parties, to furnish them with copies of the testimony taken, the costs and expense thereof to be paid to the special examiner by the party ordering the same and the fees so obtained to be retained by her as additional compensation.

Nothing herein shall prevent any of the parties from offering testimony at the trial of this case before the court, either orally or in the form of documentary evidence. This order is for the purpose of fixing the form and manner of taking testimony to the extent herein shown and shall not otherwise affect the rights of any of the parties hereto.

This cause is continued for hearing before the court until the 15th day of September, 1926.

(Signed) SMITH HICKENLOOPER,
Judge, U. S. District Court, S. D. O.

78 In United States District Court

[Title omitted.]

Order to take testimony

May 14, 1926

It appearing to the court that it will be necessary or desirable to take testimony in the above-entitled cause in States other than those enumerated in the original order filed March 1, 1926, appointing the special examiner and directing the taking of testimony herein:

It is therefore further ordered and adjudged that the present examiner, B. M. Colling, be and she hereby is authorized and directed to proceed to and take testimony in any of the States of the United States in which, upon presentation of counsel, it shall, in the opinion of the special examiner, be desirable so to do, with the same powers and duties enumerated in the original order appointing said special examiner, said original order being hereby made applicable to the entire United States in lieu of the several States originally named.

(Signed) SMITH HICKENLOOPER,
United States District Judge.

79 In United States District Court

[Title omitted.]

Application of special examiner for partial allowance of compensation

Filed Nov. 13, 1926

Comes now B. M. Colling, heretofore the duly appointed, qualified, and acting special examiner in the above-entitled cause, and repre-

sents to the court that agreeable to the former orders of the court she commenced the taking of testimony on or about March 22, 1926, and has continued taking such testimony from time to time thereafter to and including that taken in the city of Los Angeles, California, on or about July 19th; that the taking of said testimony required ninety days' actual travel to various cities in the States of South Carolina, Florida, Louisiana, and Texas on the initial trip, and the States of Iowa, Nebraska, Colorado, Utah, Idaho, Montana, Washington, Oregon, and California on the second trip taken; that said taking of testimony and other duties incident to such examinership required that she withdraw from other reporting services and give up all other means of income for the period commencing March 22, 1926, and ending September 1, 1926; that a complete transcript of said testimony has been prepared and filed with the court and constitutes 1,689 pages, or approximately 4,200 folios, exclusive of index; and that the actual expenses of travel and maintenance on the
80 several journeys have been entirely financed by your examiner in an amount to in excess of $2,000.

Your examiner further represents to the court that it will shortly be necessary to take additional testimony in the Eastern States and in the Central West, and that your examiner has received no allowances of expenses or compensation in connection with her services up to the present time.

Wherefore your examiner prays that, all things considered, the court may make such allowance to her to cover expenses incurred and compensation for services rendered as may be just and reasonable in the premises.

(Signed) B. M. Colling.

[*Duly sworn to by B. M. Colling; jurat omitted in printing.*]

81 In United States District Court

[Title omitted.]

Order as to partial compensation

Nov. 13, 1926

This cause coming on to be heard upon the application of B. M. Colling, heretofore duly appointed, qualified, and acting special examiner in the above-entitled cause, for an allowance of compensation and expenses incident to the performance of her services as such special examiner, and the court being fully advised as to actual expenses of and time spent in travel, the longer time in which she was exclusively engaged in the performance of such services, and the character, length, and reasonable value of the transcript of testimony heretofore filed in court:

It is ordered, that said B. M. Colling, special examiner as aforesaid, be and she hereby is allowed the sum of six thousand five

hundred ($6,500.00) dollars as a partial allowance of final compensation and expenses as aforesaid.

It is further ordered that pending final judgment as to costs in this proceeding, the defendants collectively, or some one for and on their behalf, and the United States of America, as complainant, each pay or cause to be paid to said special examiner one-half of the above-named compensation or the sum of three thousand two
82 hundred and fifty ($3,250.00)), taking her receipt for said payment, such receipts to be filed with the clerk of this court as evidence of such advances of court costs.

(Signed) SMITH HICKENLOOPER,
United States District Judge.

83 In United States District Court

[Title omitted.]

Application of special examiner for partial allowance of compensation

Filed June 7, 1927

Comes now B. M. Colling, heretofore the duly appointed, qualified, and acting special examiner in the above-entitled cause, and represents to the court that in the performance of her duties she has taken and completed three trips for the taking of testimony, namely, a journey to Boston, Springfield, New York, Brooklyn, and Philadephia, commencing on November 28th and ending December 15, 1926; second to Cleveland, Canton, and Columbus, Ohio, commencing on March 20, 1927, and ending on March 26, 1927; and the third to Lexington, Ky., St. Louis, Mo., Cedar Rapids, Iowa, Chicago, Ill., Milwaukee, Wis., Madison, Wis., Lansing, Mich., Detroit, Mich., Pittsburgh, Pa., Syracuse, N. Y., Ilion, N. Y., New York, N. Y., and Brooklyn, N. Y., commencing April 11, 1927, and ending May 3, 1927, an aggregate total of forty-six days; that she has personally financed traveling expenses and maintenance for said journeys and was required to and did expend the total sum of approximately $1,060 for such traveling expenses and maintenance; that she has transcribed and filed with the court complete transcript of
84 the testimony taken on said several trips, aggregating in excess of 2,800 folios, and that she is entitled to reimbursement of expenses, allowance of per diem compensation, and fees for making transcript heretofore filed.

Your applicant represents further that no compensation has been allowed or paid her for the services above enumerated, and therefore prays that the court may make such allowance as may be just and reasonable in the premises.

(Signed) B. M. COLLING.

[*Duly sworn to by B. M. Colling; jurat omitted in printing.*]

85 In United States District Court

[Title omitted.]

Order as to partial compensation

June 7, 1927

This cause coming on to be heard upon the application of B. M. Colling, heretofore duly appointed, qualified, and acting special examiner in the above-entitled cause, for an allowance of compensation and expenses incident to the performance of her services as such special examiner, and the court being fully advised as to actual expenses of and time spent in travel, the longer time in which she was exclusively engaged in the performance of such services, and the character, length, and reasonable value of the transcript of testimony heretofore filed in court:

It is ordered that said B. M. Colling, special examiner as aforesaid, be and she hereby is allowed the sum of four thousand ($4,000.00) dollars as a partial allowance of final compensation and expenses as aforesaid.

It is further ordered that pending final judgment as to costs in this proceeding, the defendants collectively, or someone for and on their behalf, and the United States of America, as complainant, each pay or cause to be paid to said special examiner one-half of the above-named compensation or the sum of two thousand ($2,000.00)
86 dollars, taking her receipt for said payment, such receipts to be filed with the clerk of this court as evidence of such advances of court costs.

(Signed) SMITH HICKENLOOPER,
United States District Court.

87 In United States District Court

[Title omitted.]

Stipulation dismissing bill as to certain defendants and as to taking of evidence

Filed Sept. 28, 1927

It is hereby stipulated by and between the United States of America, the complainant herein, and the attorneys for the defendants herein (other than the defendants Ward and Daum, who have died, and the defendant Seibert, who has not been served with process):

1. That the information herein be dismissed as against all the defendants herein except as against the defendants listed in Exhibit A hereto annexed in respect to the charges specified in said Exhibit A, it being understood that the court has stated to counsel that it would be willing to accept any recommendations of dismissal which the Government might make and that it would waive any

rights which the court might have with respect to disapproving the dismissal of any charges.

2. That no witness that has already been called and examined before the special examiner shall be called unnecessarily for further examination and that the court shall have the right to determine whether the further examination of any such witness is necessary.

88 3. That no further testimony shall be taken by the parties before the special examiner.

Dated September 13, 1927.

THE UNITED STATES OF AMERICA,
By WILLIAM J. DONOVAN,
Assistant to the Attorney General.
EZRA M. KUHNS,
SULLIVAN & CROMWELL,
ROBERT L. NEVIN,
DINSMORE, SHOHL & SAWYER,
Attorneys for said Defendants.

89 EXHIBIT A

List of charges to be tried before Judge Hickenlooper

Defendant	Page	Paragraph	Merchant	Place
Jacob A. Goldman	167	(c)	J. D. LeBlanc	New Orleans, La.
Jacob A. Goldman	169	(e)	LaKowisky	New Orleans, La.
Jacob A. Goldman	170	(f)	Grisoli	New Orleans, La.
Louis J. Desmare	173	(a)	Weilbaecher	New Orleans, La.
Louis J. Desmare	180	(a)	Georgio	New Orleans, La.
Thomas W. McCue	161	(a)	Bennett	Dallas, Texas.
Thomas W. McCue	163	(b)	Parrino	Dallas, Texas.
Clem Miner	190	(a)	Schilling	Des Moines, Iowa.
Clem Miner	192	(b)	Henry	Des Moines, Iowa.
Chester C. Hixenbaugh	242	(a)	Yeager	Pittsburgh, Pa.
Robert J. Kavelage	262	(a)	Woods & Weil	Syracuse, N. Y.
Robert J. Kavelage	263	(b)	Welch	Solvay, N. Y.
Aaron C. Sample	135	(a)	Gisher & Alderson	Birch Bay, Wash.
Herman Oelschlager	39	(d)	Gelsinger	Los Angeles, Cal.
Daniel P. Hendrickson	44	(a)	Gelsinger	Los Angeles, Cal.
Harvey S. Crocker	265	(a)	Morse	Boston, Mass.
Harvey S. Crocker	267	(b)	Baker & Carroll	Cambridge, Mass.
Harvey S. Crocker	269	(c)	Munyon	Cambridge, Mass.
George H. Flaherty	62	(a)	Mrs. Richter	Los Angeles, Cal.
Herman W. Meyers	90	(a)	Ashbourne	Long Beach, Cal.
Herman W. Meyers	93	(a)	Hanna	Long Beach, Cal.
Joseph D. Myers	75	(a)	Marsh	Hollywood, Cal.
Jack Fogarty	115	(a)	Waycott	Stockton, Cal.
Harry L. Dubell	246	(a)	Kerst	Philadelphia, Pa.
George L. Finnegan	97	(a)	Jones	Loma Linde, Cal.
Jerome B. Bliss	141	(a)	Stonebocker	Rigby, Idaho.
Jerome B. Bliss	145	(b)	Mark Bros	Twin Falls, Idaho.
Fred I. Schmeiding	229	(d)	Betty Jane Sweet Shop.	Canton, Ohio.
E. Conant Livingston	50	(b)	Clark	Los Angeles, Cal.
E. Murray Aerenschield	54	(a)	H. S. Springer	Los Angeles, Cal.
Charles S. Fortune	106	(a)	Dawson	Sacramento, Cal.
Charles R. Moore	275	(a)	Stoddard	Hyde Park, Mass.

90 In United States District Court

[Title omitted.]

Motion to dismiss

Filed Nov. 4, 1927

Now come the following defendants and they and each of them respectively moves to dismiss the charge or charges set opposite his name below on the ground that it appears on the face of the information that this proceeding for contempt was instituted more than one year after the date of the alleged act or acts complained of in said charges:

Name	Page	Paragraph	Merchant
Jacob A. Goldman	167	(c)	J. D. Le Blanc.
Jacob A. Goldman	169	(c)	LaKowisky.
Jacob Goldman	170	(f)	Grisoli.
Louis J. Desmare	173	(a)	Weilbaecher.
Clem Miner	190	(a)	Schilling.
Clem Miner	192	(b)	Henry.
Chester C. Hixenbaugh	242	(a)	Yeager.
Robert J. Kavelage	262	(a)	Woods & Weil.
Robert J. Kavelage	263	(b)	Welch.
Aaron C. Sample	135	(a)	Gisber & Alderson.
Herman Oelschleger	39	(d)	Gelsinger.
Daniel P. Hendrickson	44	(a)	Gelsinger.
Harvey S. Crocker	265	(a)	Morse.
Harvey S. Crocker	267	(b)	Baker & Carroll.
Harvey S. Crocker	269	(c)	Munyon.
91 George H. Flaherty	62	(a)	Mrs. Richter.
Joseph D. Myers	75	(a)	Marsh.
Jack Fogarty	115	(a)	Waycott.
Harry L. Dubel	246	(a)	Kerst.
Jerome B. Bliss	141	(a)	Stonebocker.
Jerome B. Bliss	145	(b)	Mark Bros.
Fred I. Schmeiding	229	(d)	Betty Jane Sweet Shop.
E. Conant Livingston	50	(b)	Clark.
E. Murray Aerenschield	54	(a)	H. S. Springer.
Charles S. Fortune	106	(a)	Dawson.
Charles R. Moore	275	(a)	Stoddard.

EZRA M. KUHNS,
SULLIVAN AND CROMWELL,
DINSMORE, SHOHL & SAWYER,
ROBERT R. NEVIN,
Attorneys for Defendants.

92 In United States District Court

[Title omitted.]

Demurrer

Filed Nov. 4, 1927

Now comes the United States of America by Haveth E. Mau, its attorney for the Southern District of Ohio, and by Porter R. Chandler, and by W. Houston Kenyon, jr., special assistants to the Attorney General, and as to a certain motion filed this day in the above-entitled cause by certain of the defendants herein, treating the said motion as a special plea in bar, says that the same and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude the United States from prosecuting the said information against the said defendants, or any of them, and that the United States is not bound in law to answer the same, and this the United States is ready to verify.

Wherefore for want of sufficient plea in this behalf the United States prays judgment, and that the said defendants may be further prosecuted, the said motion or plea to the contrary notwithstanding.

HAVETH E. MAU,
United States Attorney.
By HARRY A. ABRAMS,
Assistant United States Attorney.

PORTER R. CHANDLER,
W. HOUSTON KENYON, Jr.,
Special Assistants to the Attorney General.

93 In United States District Court

[Title omitted.]

Upon motion to dismiss and demurrer to motion.

Opinion

HICKENLOOPER, District Judge:

By motion to dismiss certain charges contained in the information in contempt and demurrer to this motion, treating the same as a special plea in bar, counsel have presently raised the question of the statute of limitations, if any, applicable to contempt proceedings, which they had contemplated raising under the plea of not guilty. This involved a consideration of sections 24 and 25 of the Clayton Act (act of October 15, 1914, c. 323, 38 Stat., pp. 730, 739, 740). This act is entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and

before passing to a consideration of sections 24 and 25 it is to be noted that the act in its entirety is a congeries of enactments supplementing existing laws as to several separate and distinct subject-matters. In the case of Sandefur v. Canoe Creek Coal Co., 293 Fed. 379, 380 (C. C. A. 6), the court recognized this fact, saying:

94 "The first eight sections pertain directly to the subject of trusts and monopolies (Comp. St. §§ 8835a–8835h); section 9 (Comp. St. §8602) concerns interstate commerce; section 10 (Comp. St. § 8835i), combinations among common carriers; section 11 (Comp. St. § 8835j), proceedings to enforce certain provisions of the act; sections 12–16 (Comp. St. §§8835k–8835o), antitrust procedure and remedies; sections 17–19 (Comp. St. §§ 1243a–1243c), regulations of injunction and restraining orders in all cases; section 20 (Comp. St. § 1243d) limits the power of an equity court to issue any injunction in a certain class of cases, viz, between employer and the employee; and sections 21–24 (Comp. St. §§ 1245a–1245d) pertain to procedure in any District Court, punishing contemptuous disregard of any order of such court, providing the act constituting contempt is also a criminal offense."

In this case, which is the only one to which we have been referred directly bearing upon the question here involved, section 25 is not allocated or grouped with any other sections as dealing with a distinct subject-matter. Sections 21 to 24, inclusive, are grouped together as dealing with procedure and punishment of contempts of court where the contemptuous act or thing done is of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any state in which the act was committed. Whether or not section 25 is to be considered as dealing with a separate subject-matter and as applicable, in accordance with its terms, to all contempts as distinguished from those included in the provisions of sections 21 to 24, or, otherwise expressed, whether the words "that nothing herein contained shall be construed to relate to" all other types of contempt, are applicable to section 25 so as to confine the operation of section 25 only to contempts in which the contemptuous act or thing done is also a criminal offense,

95 is the precise question now presented. These two sections as follows:

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

"SEC. 25. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act."

Both parties to this information in contempt contend for a precisely literal construction of the language used by Congress, the defendants contending that the words "no proceeding for contempt" are all-inclusive and too clear to call for construction by the court; the Government contending that the words "nothing herein contained" refer to all that portion of the Clayton Act which deals with procedure and punishment for contempt, including section 25, and urge in support of this contention that these sections not only appear in the act as finally adopted but also appeared in their respective order in the Clayton contempt bill, which passed the House but failed of passage in the Senate at the Sixty-second Congress. Both contentions are equally logical, for while it appears that sections 21 to 25, inclusive, deal with but a single subject-matter, contempts,
and the procedure to be followed and scope of power in the
96 court to punish for contempt, and the words "nothing herein contained" might therefore well refer to all provisions relating to this separate title or subject-matter in its entirety, it can not be denied, and with equal force, that Congress may well have believed that it was legislating, and intended to legislate, upon two related but distinct subject-matters, both when it passed the Clayton Act and considered its immediate ancestor, the Clayton contempt bill, viz: (1) Procedural regulation, including provision for a jury trial and the fixing of maximum penalty where the contemptuous act was also a criminal offense; and (2) the enactment of a statute of limitations applicable to all contempts. Since sections 21 to 25 of the Clayton Act as passed are carried bodily and verbatim from the original Clayton Contempt Act, where they appeared in the same relative order (section 24 being proposed section 268d and section 25 being proposed section 268e of the Judicial Code), the question of congressional intent, to deal with separate subject-matters or titles of the more general subject of contempts, would arise under the language used in the earlier act as well as that of the later, although in the later act many additional subjects were covered. The ambiguity arises solely from the use of the words "herein contained."

If Congress intended to deal with but one title or subject-matter in sections 21 to 25, inclusive, the language of section 24 limits the scope and application of section 25 to such contempts as were also criminal offenses, a position which might seem, to some extent at
least, to be supported by the clause of section 25 "nor shall any
97 such proceeding be a bar to any criminal prosecution for the same act or acts." If Congress intended to deal with such contempts only in sections 21 to 24, inclusive, and then turned its attention to providing a statute of limitations applicable to all

contempts, a different subject-matter, the words "herein contained" would be applicable only to the provisions of sections 21 to 24, inclusive.

In construing the provisions of this act, neither the committee reports nor the statements made by committee members in charge of the bill, nor by Mr. Clayton, its author, materially assist the court to a determination of this intent. When the Clayton Act was finally reported by the committee (63rd Cong., 2nd sess., H. R. Report No. 627) the report merely pointed out that the contempt sections were repetitions of the bill introduced by Mr. Clayton in the preceding Congress. In the debates in the House Mr. Webb (a member of the Judiciary Committee in charge of the bill) stated, as is provided by present section 24, then section 22, that this section "provides that nothing contained in this bill shall be construed to relate to contempts committed in the presence of the court," etc. In his discussion of the earlier bill, however, Mr. Webb, who then occupied a similar committee position, after discussing section 4 of the Clayton contempt bill, proposed section 268d of the Judicial Code and section 24 of the Clayton Act, made the following statement: "Section 5 or 268e makes the statute of limitations in such cases and in all contempt cases one year from the act complained of." (Cong. Rec., vol. 49, p. 8803.) Nor does the House report of the earlier bill (H. R. No. 613, 62nd Cong., 2nd sess.) throw any light upon our inquiry, for sections 268d and 268e are separately treated, and each is treated as if given literal construction. Thus this committee report provides: "Section 268d excepts from the operation of the act contempts in the presence of the court," etc., and later "section 268e bars proceedings for contempt unless begun within one year from the date of the act complained of * * *." There is thus no limitation as to the scope of application to be given to "proceedings for contempt" and no definition of the meaning of "herein contained"; that is, there is nothing indicative of whether Congress intended to deal with a single or with two subjects.

In the debate on the Clayton contempt bill in the Sixty-second Congress, Mr. Clayton, the author and sponsor of the bill and a member of the committee which reported it, does state that objection had been raised on the ground that the bill would probably detract from the power of the courts to enforce their decrees of dissolution of combinations denounced by the anti-trust law, and continued: "We have met that objection by providing in this bill that it shall not apply in any case where the United States is a party complainant." But here too, as elsewhere, it does not appear whether the objection was founded upon the possibility of requirement of a jury trial and the limitation of penalty, or upon the limitation. (Cong. Rec., vol. 48, pt. 9, p. 8878.) None of these reports or committee-member statements is wholly inconsistent with either contention except the emphatic statement of Mr. Webb as to the Clayton contempt bill, that the statute of limitations in such cases "and in all

contempt cases" is placed at one year. If admissible at all, or helpful in the least, their persuasiveness preponderates in favor of the defendants' contention.

99 The congressional committee reports and debate failing to clearly point out the congressional intent, we are constrained to turn for a determination of this intent to the act itself. No rule of construction is more fundamental than that the congressional intent must be derived from the language used; but where an ambiguity has arisen, as here, the act should be considered in its entirety, and it may be presumed that where the same words which cause the ambiguity are used elsewhere in the act Congress intended all uses to carry the same import. Thus giving simple words their usual or customary meaning, if particularity is shown throughout the act to limit the scope of general provisions wherever an intent to so limit might be doubted, a presumption against intent to limit the effect of a general provision would arise from the very absence of express and explicit limitation.

Sections 17 to 20, inclusive, constitute what had been introduced at the previous session of Congress as the Clayton injunction bill. Sections 21 to 25, inclusive, constituted what, at the previous session, was known as the Clayton contempt bill. Thus sections 17 to 25, inclusive, were of single authorship and were before Congress upon two occasions. They should therefore be examined together in our effort to construe the language used.

When we come to the second paragraph of section 20, we find the scope of its provisions expressly limited to injunctions in labor disputes as distinguished from all restraining orders or injunctions which were dealt with in sections 17 to 19. The scope of this section is carefully defined by the use of the words "no such" restraining order, thus showing intent to particularize or explicitly limit

100 its application. Again, when we come to section 22 we find this same particularity. This section provides that whenever it shall be made to appear that any person has been guilty "of such" contempt (as described in section 21) certain procedure shall be followed. In the second paragraph of this section a jury trial is provided "in all cases within the purview of this act." This has been construed to refer exclusively to contempts embraced in section 21. (Sandefur v. Canoe Creek Coal Co., supra.) By section 23 intent to limit the enactment to contempts which were also criminal offenses is shown by the use of the words "any person so accused." It is only in the third paragraph of section 22 that general language is used which might be applicable to all contempt proceedings. There it is provided that "in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months." This is but one instance of the use there of the words "in any case" and probably forms one basis for the addition of section 24. Another reason for the addition of section 24 is clearly that there may be no possible confusion arising from the enactments then under considera-

tion. Assurance is made doubly sure. But this assurance against misinterpretation is most naturally appended at the end of the affected provisions in the usual or ordinary instrument.

Two observations occur from the fact just noted. The first is that there was some definite purpose in adopting the order in which sections 24 and 25 of the Clayton Act appeared both in this act and in the Clayton contempt bill. If section 24 was to have application to section 25, the only natural inclination would be to reverse
101 their order. The other observation is that section 24 is in substance, effect, and true purpose a proviso. Its purpose and effect would have been in no way changed had it begun with the word "provided," as, for example, in the last part of the third paragraph of section 22. The first of these observations tends strongly to show that Congress intended to deal with separate subjects in sections 21 to 24 and section 25. Under the second observation it is clear that exceptions or provisos will be construed as having reference only to that which precedes.

Reverting to our observations as to particularity of expression and care in defining scope and limitation in other parts of the act, including section 24, we find a total absence of any limitation whatever in section 25. "No proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of." The addition of the clause "nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts" is but another example of care against misinterpretation. This clause but makes more glaring the absence of any limitation whatever in the clause immediately preceding. Throughout the act Congress was explicit and most careful in limiting the general language wherever limitation was intended, and we can not believe that if it were intended by section 25 to fix a statute of limitation only for such contempts as formed the subject matter of sections 21 to 24, inclusive, Congress would not have been equally explicit or would not have used appropriate words to express such intent, such words as "no such proceeding," "no proceeding for contempt within the purview of this act," or "no contempt covered by
102 section 21." No such words of limitation are found, and the language of the Supreme Court in the case of McCluny v. Silliman, 3 Pet. 270, 278, also dealing with a statute of limitations, seems applicable to the present case:

"Where the statute is not restricted to particular causes of action, but provides that the action, by its technical denomination, shall be barred, if not brought within a limited time, every cause for which the action may be prosecuted is within the statute. * * * In giving a construction to this statute, where the action is barred by its denomination, the court can not look into the cause of action."

This conclusion that Congress was in fact intending to deal with procedure and punishment of one type of contempts by sections 21 to 24, inclusive, and with the related but different subject of limitations in all classes of contempts in section 25, and that there was no

purpose that section 24 should have any application whatever to section 25, is further emphasized by the fact that the contempts which also constitute criminal offenses comprise but a relatively small portion of all contempts. Section 24 limits the effect "of this act" to this single class and small proportion of contempts. If "the act" is to be considered as sections 21 to 24, by which a new procedure is created, this is a very reasonable limitation, but the act, up to and through section 24, deals with so small a proportion of charges of contempt that we can not believe that if section 25 were intended to relate only to these Congress would not have so expressly stated rather than to have adopted language which includes all of the vastly greater mass. This, we say, emphasizes the position taken.

It is immaterial whether this determination is placed upon the doctrine that the language used in section 25 is so clear as to
103 need no interpretation (see U. S. v. Fisher, 2 Cranch, 358; Michaelson v. U. S., 266 U. S. 42, 68; Railway Co. v. Naylor, 73 O. S. 115, etc.), or upon the doctrine that Congress can not be presumed to have been willing to fix a shorter statute of limitation for this small body or class of contempts which also constitute criminal offenses, and which for that reason may seem more aggravated, than for other contempts of the authority and dignity of the courts (cf. Holy Trinity Church v. U. S., 143 U. S. 457, 472), or upon the doctrine that in sections 21 to 24, inclusive, Congress was dealing with a distinct subject matter and when a consideration of section 25 was reached "regulations of a suit in court no longer employ the mind of the legislature" (U. S. v. Fisher, supra), or upon the doctrine that it is only by so holding that complete and full effect can be given to both section 24 and section 25. All aids to construction but serve to emphasize the conclusion.

It is urged by the Government that the words "herein contained" must refer either to the section, the entire act, or to the title where the act covers more than a single subject-matter. (Cf. May v. Simmons, 4 Fed. 499, 501; Arthur v. Butterfield, 125 U. S. 70, 76; Arthur v. Vietor, 127 U. S. 572, 576.) This hypothesis in no wise conflicts with our present conclusion, for by considering sections 21 to 24, inclusive, as one title and section 25 as another title full force can be given both to the words "nothing herein contained," as referring to its title or part of the act, and to the words "no proceeding for contempt." Except by the adoption of this construction either the scope of section 24 or of section 25 must be changed and limited by judicial construction.

104 It is also said that the United States is entitled to a longer statute of limitations than the ordinary litigant and that this can be accomplished by restricting the application of section 25 to so-called civil contempts or civil contempts in which the contemptuous act also constitutes a criminal offense. It is clear that in ordinary statutes of limitation the sovereign is bound only if the intent to so include the sovereign within the provisions of the statute is specific and expressed. In the instant case, however, it must be

held that Congress had in contemplation the somewhat indistinct difference between civil and criminal contempts. While contempt proceedings have been said to be sui generis (Myers et al. v. U. S., 264 U. S. 95), all contempts are in their nature partly criminal. All are punishable by fine and imprisonment, and part or all of such fines may be paid to the sovereign. All include elements of affront and resistance to the authority and dignity of the court. All are based upon a contemptuous disregard of the courts' decrees or obstruction to the administration of justice. In view of this it is impossible to so limit and restrict this act as to make it applicable only to civil contempts, as the Government contends. Nor can the courts judicially legislate in view of claims of inefficiency or inadequacy in the governmental service, the fact that the Government is slow to learn of contempts or is slower to act, or the fact that governmental action is impeded by departmental regulations and "red tape." All contempts being quasi-criminal in their nature it must be presumed that the intent to include the Government was, in this instance at least, specific.

It might also be objected that if the limitation provided by
105 section 25 is to apply to all contempts this section must be considered as an unconstitutional restriction of the inherent powers of the court. Statutes of limitation are now favored and liberally construed as statutes of repose, and we feel that, even if universally applied, the provisions of section 25 come well within the limits of proper regulation, the propriety and legality of which were recognized in Michaelson v. U. S., supra, p. 66.

By construing sections 21 to 24 on the one hand and section 25 on the other as dealing with separate subjects and section 24 as constituting nothing more nor less than an exception or proviso, and thus as affecting only that which precedes, the scope of all sections is clear and distinct. It is said that the words "herein contained" have never been and can not be construed as meaning "hereinbefore," citing Iasigi v. Iasigi, 161 Mass. 75; Arthur's Executors v. Butterfield, 125 U. S. 70; State ex rel. v. Glenn, 54 Tenn. 472; Arthur's Executors v. Vietor, 127 U. S. 572, 576; Smythe v. Fiske, 23 Wall 374, 381, etc. Granted, however, that the Clayton Act is, as we have said, a congeries or aggregation of a number of separate enactments, and that sections 21 to 24, inclusive, constitute the whole of one of these enactments or a single subject matter, the decision herein announced in no wise conflicts with the doctrine of the cases cited. With regard to those sections which had previuosly comprised the Clayton injunction bill (§§ 17 to 20), it is manifest that Congress dealt with two separate and distinct subjects, (1) the granting of preliminary restraining orders and injunctions in all cases and (2) a definition (perhaps merely declaratory of the common law) of the
right of the courts to grant injunctions in cases involving labor
106 disputes. It is not any more unreasonable to conclude that in the Clayton contempt bill, incorporated into the Clayton Act,

sections 21 to 25, inclusive, Congress was also dealing with two subjects. Each original bill covered two different and distinct matters.

Jealous as all courts are of their dignity and of obedience to their lawful decrees, and zealous as all courts must be for the protection of the force and inviolability of their authority, we have irresistibly come to this conclusion upon careful study of the act and the authorities cited. Notwithstanding a natural inclination to punish disobedience of our orders if, and when called to our attention, we feel constrained to overrule the demurrer to the motion to dismiss or special plea in bar for the reasons hereinabove stated. The demurrer being overruled and, in our opinion, the special plea in bar stating a good defense of the running of the statute of limitations, it follows that the several charges which show upon their face that such statute has run must be dismissed, and order may be drawn accordingly.

November 29th, 1927.

(Signed) SMITH HICKENLOOPER,
U. S. District Judge.

For the Government:
PORTER R. CHANDLER and
W. H. KENYON, Jr.,
Special Assistants to the Attorney General.

For the defendants:
ROBERT R. NEVIN,
Of Nevin & Kalbfus, Dayton, Ohio.
EZRA M. KUHNS, *Dayton, Ohio.*
FRANK F. DINSMORE,
Of Dinsmore, Shohl & Sawyer, Cincinnati, Ohio.
E. H. SYKES and
E. H. GREEN,
Of Sullivan & Cromwell, New York, N. Y.

107 In United States District Court

[Title omitted.]

Judgment

Dec. 2, 1927

This cause coming on to be heard on the motion heretofore, to wit, on November 4, 1927, filed by the defendants and each of them hereinafter named, and the demurrer to said motion filed on said fourth of November, 1927, by the United States of America, complainant herein, the court having heard the arguments of counsel and being fully advised in the premises, on consideration thereof does find:

First. That the demurrer is not well taken and should be overruled.

Second. That said motion is well taken and should be sustained, in that the statute of limitations constitutes a bar to the further prosecution of the charges hereinafter set forth.

It is therefore ordered, adjudged, and decreed by the court that the demurrer filed by complainant herein on November 4, 1927, to the motion of the respective defendants herein filed on said date be and the same is hereby overruled; and it is further ordered, adjudged, and decreed that the motion filed by the certain defendants named in said motion on November 4, 1927, be and the same is hereby sustained, except as to defendant Charles S. Fortune; that the information be and the same is hereby dismissed as to the following-named defendants, and each of them respectively, so far as relates to charges hereinafter specifically set forth, to wit:

108 Defendant	Page	Paragraph	In the matter of—
Jacob A. Goldman	167	(c)	J. D. Le Blanc.
Jacob A. Goldman	169	(e)	LaKowisky.
Jacob Goldman	170	(f)	Grisoli.
Louis J. Desmare	173	(a)	Weilbaecher.
Clem Miner	190	(a)	Schilling.
Clem Miner	192	(b)	Henry.
Chester C. Hixenbaugh	242	(a)	Yeager.
Robert J. Kavelage	262	(a)	Woods & Weil.
Robert J. Kavelage	263	(b)	Welch.
Aaron C. Sample	135	(a)	Gisher & Alderson.
Herman Oelschleger	39–	(d)	Gelsinger.
Daniel P. Hendrickson	44	(a)	Gelsinger.
Harvey S. Crocker	265	(a)	Morse.
Harvey S. Crocker	267	(b)	Baker & Carroll.
Harvey S. Crocker	269	(c)	Munyon.
George H. Flaherty	62	(a)	Mrs. Richter.
Joseph D. Myers	75	(a)	Marsh.
Jack Fogarty	115	(a)	Waycott.
Harry L. Dubel	246	(a)	Kerst.
Jerome B. Bliss	141	(a)	Stonebocker.
Jerome B. Bliss	145	(b)	Mark Bros.
Fred I. Schmeiding	229	(d)	Betty Jane Sweet Shop.
E. Conant Livingston	50	(b)	Clark.
E. Murray Aerenschield	54	(a)	H. S. Springer.
Charles R. Moore	275	(a)	Stoddard.

All questions of costs are hereby continued for further consideration of the court.

To all of which the United States, by its counsel, hereby excepts.

Enter.

(Signed) SMITH HICKENLOOPER,
U. S. District Judge.

109 In United States District Court

[Title omitted.]

Order withdrawing motion to dismiss as to defendant Charles S. Fortune

Dec. 2, 1927

By agreement of the parties hereto, and with the approval of the court, the motion heretofore, to wit, on November 4, 1927, filed,

wherein it is moved by certain defendants that certain charges contained in the information, as in said motion set forth, be dismissed for the reason that it appears on the face of the information that this proceeding for contempt was instituted more than one year after the date of the alleged act or acts complained of in said charge, is hereby withdrawn in so far as it relates to the defendant Charles S. Fortune. (Information, page 106, paragraph (a); merchant, Dawson.)

Said motion is withdrawn in so far as said defendant Fortune is concerned for the reason that it does not appear affirmatively upon the face of the information that the alleged act or acts complained of in said charge were committed more than one year prior to the date this proceeding for contempt was instituted.

Enter.

HICKENLOOPER, *J.*

Approved:
PORTER R. CHANDLER,
Special Assistant to the Attorney General.

Approved:
EZRA M. KUHNS,
FRANK F. DINSMORE,
ROBERT R. NEVIN,
SULLIVAN & CROMWELL,
Attys. for Deft. Fortune.

110 In United States District Court

[Title omitted.]

Petition for writ of error

Filed Dec. 28, 1927

Now comes the United States of America, by Haveth E. Mau, its attorney for the Southern District of Ohio, and complains that in the record of proceedings had in this cause and in the decision and judgment over-ruling the demurrer interposed by the United States of America to the so-called motion, which was in fact a special plea in bar, filed on behalf of the several defendants set forth in the schedule hereto annexed, with respect to the charges set forth in said schedule, and in sustaining said motion or plea and in dismissing the information as to the several defendants and charges set forth in said schedule, the District Court of the United States for the Southern District of Ohio has committed manifest error, as more fully appears in the assignments of error herewith submitted.

The United States of America therefore respectfully prays
111 for the allowance of a writ of error and for such orders and processes as may cause said error to be corrected by the Supreme Court of the United States.

Dated December 28, 1927.

HAVETH E. MAU,
United States Attorney.
PORTER R. CHANDLER,
Special Assistant to the Attorney General.

Service of a copy of the above petition for writ of error with accompanying schedule is hereby acknowledged on behalf of the several defendants set forth in said schedule this 24 day of December, 1927.

SULLIVAN & CROMWELL,
DINSMORE, SHOHL & SAWYER,
EZRA M. KUHNS,
R. R. NEVIN,
Attorneys for Defendants.

112 *Schedule*

Defendant	Page of information	Paragraph of information	In the matter of—
Jacob A. Goldman	167	(c)	J. D. Le Blanc.
Jacob A. Goldman	169	(e)	LaKowisky.
Jacob Goldman	170	(f)	Grisoli.
Louis J. Desmare	173	(a)	Weilbaecher.
Clem Miner	190	(a)	Schilling.
Clem Miner	192	(b)	Henry.
Chester C. Hixenbaugh	242	(a)	Yeager.
Robert J. Kavelage	262	(a)	Woods & Weil.
Robert J. Kavelage	263	(b)	Welch.
Aaron C. Sample	135	(a)	Gisher & Alderson.
Herman Oelschlager	39	(d)	Gelsinger.
Daniel P. Hendrickson	44	(a)	Gelsinger.
Harvey S. Crocker	265	(a)	Morse.
Harvey S. Crocker	267	(b)	Baker & Carroll.
Harvey S. Crocker	269	(c)	Munyon.
George H. Flaherty	62	(a)	Mrs. Richter.
Joseph D. Myers	76	(a)	Marsh.
Jack Fogarty	115	(a)	Waycott.
Harry L. Dubel	246	(a)	Kerst.
Jerome B. Bliss	141	(a)	Stonebocker.
Jerome B. Bliss	145	(b)	Mark Bros.
Fred I. Schmeiding	229	(d)	Betty Jane Sweet Shop.
E. Conant Livingston	50	(b)	Clark.
E. Murray Aerenschield	54	(a)	H. S. Springer.
Charles R. Moore	275	(a)	Stoddard.

113 In United States District Court

[Title omitted.]

Assignments of error

Filed Dec. 28, 1927

Now comes the United States of America, by Haveth E. Mau, its attorney for the Southern District of Ohio, and says that in the decision and judgment of the District Court of the United States for the Southern District of Ohio, heretofore entered on December 2, 1927, in the above-entitled proceeding, said District Court erred in the following particulars:

1. In overruling the demurrer interposed by the United States to the so-called motion, which was in fact a special plea in bar, filed on November 4, 1927, on behalf of certain of the defendants herein with respect to certain charges in the information (said defendants and charges being set forth in the schedule annexed hereto).

2. In sustaining the so-called motion, which was in fact a special plea in bar, filed on November 4, 1927, on behalf of certain
114 of the defendants herein with respect to certain of the charges in the information (said defendants and charges being set forth in the schedule annexed hereto).

3. In dismissing the information herein as to the several defendants and with respect to the several charges set forth in the order of said court, filed on December 2, 1927 (said defendants and charges being the same as those set forth in the schedule annexed hereto).

4. In holding, as it did, in overruling said demurrer and in sustaining said so-called motion or plea that the period of limitation applicable to the several charges pending against the several defendants set forth in the schedule annexed hereto was one year, and in not holding that the period of limitation applicable to said defendants and said charges was three years.

The United States of America, plaintff in error, therefore prays that the decision aforesaid and the order and judgment entered therein may be reversed, and that the United States may further prosecute the information herein against the several defendants with respect to the several charges set forth in said order and judgment (being the same defendants and charges as are set forth in the schedule annexed hereto).

Dated December 28, 1927.

HAVETH E. MAU,
United States Attorney.
PORTER R. CHANDLER,
Special Assistant to the Attorney General.

115 Service of a copy of the above assignments of error, with the schedule thereto annexed, is hereby acknowledged on behalf of each of the defendants named in said schedule, this 24th day of December, 1927.

SULLIVAN & CROMWELL,
DINSMORE, SHOHL & SAWYER,
EZRA M. KUHAS,
R. R. NEVIN,
Attorneys for Defendants.

116 *Schedule*

Defendant	Page of information	Paragraph of information	In the matter of—
Jacob A. Goldman	167	(c)	J. D. Le Blanc.
Jacob A. Goldman	169	(c)	LaKowisky.
Jacob Goldman	170	(f)	Grisoli.
Louis J. Desmare	173	(a)	Weilbaecher.
Clem Miner	190	(a)	Schilling.
Clem Miner	192	(b)	Henry.
Chester C. Hixenbaugh	242	(a)	Yeager.
Robert J. Kavelage	262	(a)	Woods & Weil.
Robert J. Kavelage	263	(b)	Welch.
Aaron C. Sample	135	(a)	Gisher & Alderson.
Herman Oelschlager	39	(d)	Gelsinger.
Daniel P. Hendrickson	44	(a)	Gelsinger.
Harvey S. Crocker	265	(a)	Morse.
Harvey S. Crocker	267	(b)	Baker & Carroll.
Harvey S. Crocker	269	(c)	Munyon.
George H. Flaherty	62	(a)	Mrs. Richter.
Joseph D. Myers	76	(a)	Marsh.
Jack Fogarty	115	(a)	Waycott.
Harry L. Dubel	246	(a)	Kerst.
Jerome B. Bliss	141	(a)	Stonebocker.
Jerome B. Bliss	145	(b)	Mark Bros.
Fred I. Schmeiding	229	(d)	Betty Jane Sweet Shop
E. Conant Livingston	50	(b)	Clark.
E. Murray Aerenschield	54	(a)	H. S. Springer.
Charles R. Moore	275	(a)	Stoddard.

117 In United States District Court

[Title omitted.]

Order allowing writ of error

Dec. 28, 1927

This 28th day of December, 1927, came the United States of America, complainant herein, by its attorneys, and filed herein and presented to the court its petition praying for the allowance of a writ of error and assignments of error intended to be urged by it, praying also that a transcript of record and proceedings and papers on which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such

other and further relief may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error as prayed for by the complainant to permit the judgment and decision of this court in the above-entitled cause to be reviewed by the Supreme Court of the United States.

(Signed) SMITH HICKENLOOPER,
Judge, U. S. District Court, S. D. O.

118 Service of a copy of the above order is hereby acknowledged on behalf of all defendants in error this 28th day of December, 1927.

E. M. KUHNS,
R. R. NEVIN,
SULLIVAN & CROMWELL,
DINSMORE, SHOHL & SAWYER,
Counsel for Defendants in Error.

119 In United States District Court

[Title omitted.]

Motion for order as to filing of testimony

Filed Jan. 19, 1928

Now come certain of the defendants in this cause as follows, to wit:

Defendant	Page	Paragraph	In the matter of—
Jacob A. Goldman	167	(e)	J. D. Le Blanc.
Jacob A. Goldman	169	(e)	LaKowisky.
Jacob A. Goldman	170	(f)	Grisoli.
Louis J. Desmare	173	(a)	Weilbacher.
Clem Miner	190	(a)	Schilling.
Clem Miner	192	(b)	Henry.
Chester C. Hixenbaugh	242	(a)	Yeager.
Robert J. Kavelage	262	(a)	Woode & Weil.
Robert J. Kavelage	263	(b)	Welch.
Aaron C. Sample	135	(a)	Gisher & Alderson.
Herman Oelschleger	39–	(d)	Gelsinger.
Daniel P. Hendrickson	44	(a)	Gelsinger.
Harvey S. Crocker	265	(a)	Morse.
Harvey S. Crocker	267	(b)	Baker & Carroll.
Harvey S. Crocker	269	(c)	Munyon.
George H. Flaherty	62	(a)	Mrs. Richter.
Joseph D. Myers	75	(a)	Marsh.
Jack Fogarty	115	(a)	Waycott.
Harry L. Dubel	246	(a)	Kerst.
Jerome B. Bliss	141	(a)	Stonebocker.
Jerome B. Bliss	145	(b)	Mark Bros.
Fred I. Schmeiding	229	(d)	Betty Jane Sweet Shop.
E. Conant Livingston	50	(b)	Clark.
E. Murray Aerenschield	54	(a)	H. S. Springer.
Charles R. Moore	275	(a)	Stoddard.

d move the court that an order be entered upon the journal of the urt of the filing with the court of the testimony taken herein by e special examiner appointed pursuant to the orders of the court tered on March 1, 1926, and May 14, 1926, including the testimony ken by the said special examiner against the defendants herein named in respect to the said charges above stated, and that 0 said order be made nunc pro tunc as of the dates of the filing of said testimony. This motion is based upon the following ounds, to wit:

1. The records kept by the special examiner show that volume of the testimony taken, including pages 1 to 387, inclusive, was ed with the court on April 30, 1926; that volumes 2, 3, and 4, ges 388 to 1689, inclusive, taken by the special examiner, we.e ed on August 25, 1926, with the court; that volume 5 of the testi- ony taken before the special examiner, pages 1689 to 2280, inclu- e, was filed with the court on January 8, 1927; that volume 6 of e testimony taken before the special examiner, including pages 81 to 3050, inclusive, was filed with the court on May 31, 1927.

2. That the said testimony so taken and filed with the court on d dates included testimony in respect to each of the above-named fendants and each of the above-named charges.

3. That the application of the special examiner filed in the clerk's ice of this court on November 13, 1926, for the partial allowance compensation states that at that time 1,689 pages of testimony, proximately 4,200 folios, had been taken before the special exami- r and filed with the court; that on said November 13, 1926, the urt made an entry on the journal in this cause stating that the d testimony had been filed in court.

4. The application of the special examiner for partial allowance compensation filed on June 7, 1927, states that 2,800 folios of timony had been taken and filed with the court, and the entry de by the court on said day, as appears from the journal, states t said testimony was filed in court.

5. That no entry was made on the journal of the court of the ng of the said testimony on April 30, 1926, August 25, 1926, Janu- 8, 1927, and May 31, 1927, through inadvertence, and that an der should now be made nunc pro tunc as of those dates.

6. That the six volumes of testimony filed with the court, as herein stated, were through inadvertence not marked "Filed" by the clerk of the court, and that said volumes should now be marked "Filed" nunc pro tunc as of said dates.

EZRA M. KUHNS,
ROBERT R. NEVIN,
SULLIVAN & CROMWELL,
DINSEMORE, SHOHL & SAWYER,
Attorneys for said Defendants.

122 In United States District Court

[Title omitted.]

Order as to filing testimony

Jan. 19, 1928

This day this cause came on to be heard on the motion of certain defendants as follows, to wit:

Defendant	Page	Paragraph	In the matter of—
Jacob A. Goldman	167	(c)	J. D. Le Blanc.
Jacob A. Goldman	169	(e)	LaKowisky.
Jacob Goldman	170	(f)	Grisoli.
Louis J. Desmare	173	(a)	Weilbacher.
Clem Miner	190	(a)	Schilling.
Clem Miner	192	(b)	Henry.
Chester C. Hixenbaugh	242	(a)	Yeager.
Robert J. Kavelage	262	(a)	Woods & Weil.
Robert J. Kavelage	263	(b)	Welch.
Aaron C. Sample	135	(a)	Gisher & Alderson.
Herman Oelschleger	39	(d)	Gelsinger.
Daniel P. Hendrickson	44	(a)	Gelsinger.
Harvey S. Crocker	265	(a)	Morse.
Harvey S. Crocker	267	(b)	Baker & Carroll.
Harvey S. Crocker	269	(c)	Munyon.
George H. Flaherty	62	(a)	Mrs. Richter.
Joseph D. Myers	75	(a)	Marsh.
Jack Fogarty	115	(a)	Waycott.
Harry L. Dubel	246	(a)	Kerst.
Jerome B. Bliss	141	(a)	Stonebocker.
Jerome B. Bliss	145	(b)	Mark Bros.
Fred I. Schmeiding	229	(d)	Betty Jane Sweet Shop.
E. Conant Livingston	50	(b)	Clark.
E. Murray Aerenschield	54	(a)	H. S. Springer.
Charles R. Moore	275	(a)	Stoddard.

for an order nunc pro tunc of the filing of the evidence heretofore taken by the special examiner appointed by this court on March 1, 1926, and May 14, 1926, including the testimony taken against the above-named defendants in respect to the above-named charges, and counsel for the complainant, the United States of America, and said defendant, being present in open court, the said motion was heard by the court. On consideration whereof the court

123 finds that volume 1 of the testimony, including pages 1 to 387, inclusive, was taken before said special examiner during the pendency of said cause and in preparation for and in anticipation of the trial in open court of said contempt proceedings. Said transcript was completed by the special examiner on April 30, 1926, and then lodged with the judge of this court; that volumes 2, 3, and 4 of said testimony, pages 388 to 1689, inclusive, similarly

ken in anticipation of trial and in preparation therefor, were dged with such judge of this court on April 25, 1926; that volume pages 1689 to 2280, inclusive, similarly taken in anticipation of nd preparation for trial in open court, was lodged with such judge f this court January 8, 1927; that volume 6, pages 2281 to 3050, nclusive, similarly taken in preparation for and anticipation of the ial in open court, was lodged with such judge of this court on May 1, 1927; that said volumes of testimony were all of the testimony ken before the special examiner under said orders of court and ncluded the testimony in reference to the above-named defendants nd the above-named charges; that court and counsel understood at said testimony was so lodged with the judge of this court in s official capacity and pending trial of said charges in open court, which trial either the defendants or the Government should e privileged to introduce additional testimony and to rely for rosecution or defense upon such portions of the testimony thereto- re taken, transcribed, and lodged with said judge as might be esired; that proper record of the fact of the taking of such testi- ony and the filing or lodgment thereof with such judge was tended and was not made through inadvertence and oversight, and at said volumes were not marked "Filed" by the clerk of this urt or by said judge.

It is therefore ordered by the court that the motion of said defendants be, and the same is hereby, granted to this extent, 4 that the record shall now show that voluminous testimony was taken from time to time before the special examiner there- fore appointed, which testimony has been transcribed by said ecial examiner and lodged with the judge of this court, as and in e capacity above stated, as follows: Volume 1 of the testimony as lodged with the judge April 30, 1926; volumes 2, 3, and 4 were dged with the judge August 25, 1926; volume 5 was lodged with e judge January 8, 1927; and volume 6 was lodged with the judge ay 31, 1927; that each of said volumes of testimony shall be en- rsed as "Filed with the court pending trial in open court" upon eir above respective dates of filing; and that the clerk of this court , and he is hereby, ordered to make proper minute of said filing lodgment with the judge of this court of said volumes of testimony nc pro tunc, as of the dates on which said volumes were respec- ely lodged with the judge.

SMITH HICKENLOOPER,
United States District Judge, Southern District of Ohio.

125 In United States District Court

[Title omitted.]

Stipulation in reference to the record

Filed Jan. 19, 1928

To HARRY F. RABE,
Clerk for the United States Court for the Southern District of Ohio, Western Division.

It is hereby stipulated between counsel for the respective parties that in making up the record for the Supreme Court of the United States in this cause the following portions of the record to be incorporated in the transcript, as follows, to wit:

1. November 2, 1925. Information in contempt and petition for rule to show cause as per printed copy attached to this stipulation and omitting therefrom the matter stricken out in said attached copy.
2. November 2, 1925. Motion for rule to show cause.
3. November 2, 1925. Order for rule to show cause.
4. February 15, 1926. The plea of "not guilty" entered by defendant Jacob A. Goldman, appending thereto a certificate that a plea of "not guilty" in identical form was filed by each of the defendants in error between February 15, 1926, and March 27, 1926.
5. March 1, 1926. Order appointing special examiner to take testimony.
6. May 14, 1926. Order authorizing special examiner to take further testimony.
7. November 13, 1926. Application of the special examiner for partial allowance of compensation.

126 8. November 13, 1926. Order made by the court allowing partial compensation to the special examiner.

9. June 7, 1927. Application of special examiner for partial allowance of compensation.
10. June 7, 1927. Order of the court allowing partial compensation to the special examiner.
11. September 28, 1927. Stipulation of counsel as filed.
12. November 4, 1927. "Motion" to dismiss charges as against certain defendants based on the statute of limitations. (It is agreed that the use of the term "motion" herein is without prejudice to any of the claims made by the respective parties herein and shall not preclude the respective parties from asserting that such document was not in law a motion.)
13. November 4, 1927. Demurrer to above "motion," treating the same as a special plea in bar.
14. November 29, 1927. Opinion of the court.
15. December 2, 1927. Entry of judgement overruling demurrer and sustaining said "motion."
16. December 2, 1927. Entry withdrawing "motion" as to defendant Charles S. Fortune.

17. December 28, 1927. Petition for writ of error.
18. December 28, 1927. Assignments of error.
19. December 28, 1927. Order allowing writ of error.
20. December 28, 1927. Writ of error.
21. December 28, 1927. Citation to Supreme Court of the United States.
22. January 19, 1928. Motion of certain defendants for a nunc pro tunc order.
23. January 19, 1928. Nunc pro tunc entry of the court upon the above motion in reference to the filing of the testimony taken before the special examiner.

127 24. This stipulation.

In witness whereof this stipulation is signed by counsel for the respective parties this 19th day of January, 1928.

HAVETH E. MAU,
United States Attorney,
W. HOUSTON KENYON, JR.,
Special Assistant to the Attorney General,
Counsel for Complainant.
EZRA M. KUHNS,
ROBERT R. NEVIN,
SULLIVAN & CROMWELL,
DINSMORE, SHOHL & SAWYER,
Counsel for Defendant.

128 In United States District Court

Writ of error

Filed December 23, 1927

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between the United States of America, complainant, and Jacob A. Goldman, Louis J. Desmare, Clem Miner, Chester C. Hixenbaugh, Robert J. Kavelage, Aaron C. Sample, Herman Oelschlager, Daniel P. Hendrickson, Harvey S. Crocker, George H. Flaherty, Joseph D. Meyers, Jack Fogarty, Harry L. Dubel, Jerome B. Bliss, Fred I. Schmeiding, E. Conant Livingston, E. Murray Aerenschield, and Charles R. Moore, defendants, a manifest error hath happened, to the great damage of the said United States of America, as is said and appears by its complaint:

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties afore-

said in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States ought to be done.

129 Witness the honorable William H. Taft, Chief Justice of the United States, this 28th day of December, in the year of our Lord one thousand nine hundred and twenty-seven.

[SEAL.] HARRY F. RABE,
Clerk of the District Court of the United States of America for the Southern District of Ohio.

The foregoing writ is hereby allowed.

SMITH HICKENLOOPER,
United States District Judge.

Service of a copy of the above writ of error is hereby admitted on behalf of all defendants in error this 28th day of December, 1927.

E. M. KUHNS,
R. R. NEVIN,
SULLIVAN & CROMWELL,
DINSMORE, SHOHL & SAWYER,
Attorneys for Defendants in Error.

130–131 [Citation in usual form showing service on R. R. Nevin et al. filed Dec. 23, 1927, omitted in printing.]

132 [Clerk's certificate to foregoing transcript omitted in printing.]

133 In Supreme Court of the United States

Statement of points upon which the plaintiff in error intends to rely and designation to print the entire record

Filed January 27, 1928

The plaintiff in error intends to rely upon the contention that the District Court erred in sustaining a so-called motion, which was in fact and in substance a special plea in bar based upon the statute of limitations, to the charges against the several defendants in

error in the information in criminal contempt in this cause, upon the following grounds:

1. That the general period of limitation applicable to criminal contempt cases is three years, under the provision of Rev. Stats. 1044, and not one year as held by the District Court.

2. That in view of the express language of section 24 of the Clayton Act (act of October 15, 1914, chapter 323, 37 Stat. 730, 740; U. S. C. Title 28, section 389) the one-year period of limitation specified in section 25 of the same Clayton Act (U. S. C. Title 28, section 390) has no application to criminal contempt cases arising out of violations of decrees entered in suits brought by the United States.

134 The plaintiff in error thinks that the entire record as filed will be necessary for the consideration of the contentions above enumerated.

WILLIAM D. MITCHELL,
Solicitor General.

J.

Dated JANUARY 27, 1928.

Service of a copy of the foregoing statement of points is hereby acknowledged on behalf of all defendants in error this day of , 1928.

135 [File endorsement omitted.]

136 Department of Justice, office of the Solicitor General.

Hon. WILLIAM D. MITCHELL,
Solicitor General.

DEAR SIR: Service of a copy of the statement of points on which plaintiff in error intends to rely in the above-entitled cause is hereby acknowledged this day of , 19 .

Respectfully,

ROBERT R. NEVIN,
Of Counsel for Defendants in Error.

137 Department of Justice, office of the Solicitor General.

Hon. WILLIAM D. MITCHELL,
Solicitor General.

DEAR SIR: Service of a copy of the statement of points on which plaintiff in error intends to rely
brief on behalf of
in above-entitled cause is hereby acknowledged, this 13th day of February, 1928.

Respectfully,

FRANK F. DINSMORE,
Counsel for Defendants in Error.

DINSMORE, SHOHL & SAWYER,
Of Counsel.

138 Department of Justice, office of the Solicitor General.

Hon. WILLIAM D. MITCHELL,
Solicitor General.

DEAR SIR: Service of a copy of the statement of points on which plaintiff in error intends to rely in the above-entitled cause is hereby acknowledged this 13 day of February, 1928.

Respectfully,

EZRA M. KUHNS,
Counsel for Defendants in Error.

[Stamped:] Office of Solicitor General. Received Feb. 15, 1928.

[Endorsement on cover:] File No. 33175. S. Ohio, D. C. U. S. Term No. 723. The United States of America, plaintiff in error, vs. Jacob A. Goldman, Louis J. Desmare, Clem Miner, et al. Filed January 27th, 1928. File No. 33175.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 723

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

JACOB A. GOLDMAN ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (unreported) appears at R. 46.

JURISDICTION

The judgment to be reviewed is that of the District Court for the Southern District of Ohio filed December 2, 1927. (R. 54.) The writ of error was sued out December 28, 1927. (R. 56.)

By this judgment the District Court sustained a special plea in bar to an information charging the defendants with criminal contempt in violation of a decree. The plea was sustained solely on the ground

that more than one year had elapsed between the commission of the offenses charged and the filing of the information. It is the Government's contention that the period of limitation here to be applied is three years (under the decision of *Gompers* v. *United States*, 233 U. S. 604) and not one year (under the Clayton Act of October 15, 1914, c. 323, 38 Stat. 730 (U. S. C. Title 28, Sec. 390).

This writ of error is prosecuted under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246; U. S. C. Title 18, Sec. 682. (R. 65.) The jurisdiction of this Court is challenged by the defendants and dealt with on pages 12–26 of this brief.

QUESTIONS PRESENTED

The first question is whether the Criminal Appeals Act, in authorizing the United States to sue out writs of error in all criminal cases to review judgments sustaining special pleas in bar, allows such a review of a decision dismissing an information charging criminal contempt on the ground that the statute of limitations has run.

The other question is whether the statute of limitations applicable to this case fixes one or three years as the period of limitation.

STATUTES INVOLVED

The Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C. Title 18, Sec. 682), provides:

> A writ of error may be taken by and on behalf of the United States from the district

* * * courts direct to the Supreme Court of the United States *in all criminal cases*, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant. (Italics ours.)

Sections 21 to 25 of the Clayton Law, c. 323, 38 Stat. 730, 738–740 (U. S. C., Title 28, Secs. 386–390), provides:

SEC. 21. That any person who shall wilfully disobey any lawful writ, process, order,

rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however*, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer,

and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000,

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nor shall such imprisonment exceed the term of six months: *Provided*, That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

SEC. 23. That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia.

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor

to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

SEC. 25. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

Section 1044 of the Revised Statutes, as amended by the Act of November 17, 1921, c. 124, Sec. 1, 42 Stat. 220 (U. S. C. Title 18, Sec. 582), provides:

No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however*, That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This act shall apply to acts, offenses, or transactions where the exist

> ing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

Section 1046 of the Revised Statutes (U. S. C. Title 18, Sec. 584) provides:

> No person shall be prosecuted, tried, or punished for any crime arising under the revenue laws, or the slave trade laws of the United States, unless the indictment is found or the information is instituted within five years next after the committing of such crime.

STATEMENT

On November 2, 1925 (R. 37), in the District Court of the United States for the Southern District of Ohio, the United States Attorney filed an information in criminal contempt, charging the defendants, parties to this appeal, and others—sales agents and salesmen of the National Cash Register Company—with having in 1923 or 1924 (more than one year but less than three years prior to filing the information) violated the provisions of a final decree entered in that District in 1916 in the case of *United States* v. *National Cash Register Company et al.* That decree (set forth in full at R. 5), held that the National Cash Register Company had violated the Sherman Antitrust Act and enjoined the company and its officers and agents from doing any of certain specified acts set forth in the decree. On the date of the filing of the information the court granted a rule to show cause and on February 15, 1926, the defendants

severally appeared and entered pleas of not guilty. (R. 38–39.)

In order to take the testimony of witnesses who resided in different parts of the country, the court, by order dated March 1, 1926, appointed a special examiner. (R. 39.) Under this order the examiner was directed to take testimony in anticipation of trial and in preparation thereof. (R. 62–63.) At the time of the entry of the order it was understood (this understanding was confirmed by a nunc pro tunc order by the court dated January 19, 1928 (R. 62)), that both the defendants and the Government were to have the right "to introduce additional testimony and to rely for prosecution or defense upon such portions of the testimony theretofore taken, transcribed, and lodged with said judge as might be desired." After the examiner had herself taken the testimony stenographically and transcribed it, she lodged it with the Judge in his official capacity, but she did not file it with the Clerk of the District Court. (R. 63.) Before there was any trial in open court, but after testimony had been taken before such examiner, the eighteen defendants who are concerned in this appeal filed a motion which they called "a motion to dismiss." This motion was based upon the ground only "that it appears on the face of the information that this proceeding for contempt was instituted more than one year after the date of the alleged act or acts complained of in said charges." (R. 45.)

The Government demurred to this so-called motion, treating it in the demurrer as a special plea in bar. (R. 46.) On December 2, 1927, the District Court entered judgment overruling the Government's demurrer and sustaining the motion, which the court, in its opinion (R. 46–54) designated as a special plea in bar. In that opinion the court held that as to these defendants the prosecution was barred by reason of the one year statute of limitations. Jurisdiction is here invoked under the third section of the Criminal Appeals Act.

SPECIFICATION OF ERROR TO BE URGED

The District Court erred in sustaining the motion to dismiss, and in holding that the period of limitation was one year.

SUMMARY OF ARGUMENT

I. This Court has jurisdiction of this case under the Criminal Appeals Act of 1907 because (a) the Criminal Appeals Act applies to all criminal cases and criminal contempts are crimes, both at common law and under modern statutes; (b) the Third Section of the Act relating to pleas in bar is applicable to criminal cases begun by information (as was this case) as well as those begun by indictment, for that section is expressly made applicable to "all criminal cases;" (c) the motion to dismiss, filed on behalf of the defendants below, was a special plea in bar within the meaning of the Act. The motion set up the statute of limitations contained in Section 25 of the

Clayton Act and such matter is properly put in issue under a special plea in bar. The fact that it was termed a motion to dismiss is unimportant for under this section of the Criminal Appeals Act the question whether the motion was in fact a special plea in bar should be determined not by form but by substance; (d) the defendants were never in jeopardy, for they were never on trial on any issue of fact before the court.

II. The case of *Gompers* v. *United States* settled that criminal contempts are governed by the three-year period of limitations. This period is still applicable to criminal contempts prosecuted by the Government for the law as to them has not been changed. The one-year period of limitation imposed by Section 25 of the Clayton Act by its very terms does not apply to this case, for Section 24 of that Act declares that "nothing herein contained" shall apply to such cases prosecuted by the United States. This view of the meaning of the contempt provisions of the Clayton Act is supported by the language of the Committee reports in Congress, by the debates in Congress, and by the history of the provisions in question. Moreover, this meaning of the statute is expressly adopted in the United States Code where it is declared that the one-year statute of limitations does not apply to cases prosecuted by the United States.

ARGUMENT

I

THIS COURT HAS JURISDICTION OF THIS CASE UNDER THE CRIMINAL APPEALS ACT OF 1907

Prior to the enactment of the Criminal Appeals Act certain writs of error from the Supreme Court to the Circuit Courts were governed by the provisions of the Act of March 3, 1891. By this statute appeals or writs of error were authorized "in any case that involves the construction or application of the Constitution of the United States." This statute was construed in the case of *United States* v. *Sanges*, 144 U. S. 310. There the Government sued out a writ of error to review a judgment of the District Court sustaining a demurrer to an indictment on the ground that the statute on which the indictment was based was unconstitutional. This court held (p. 312) that the provision above quoted did not confer on the United States the right to sue out a writ of error in a criminal case for "it is settled by an overwhelming weight of American authority, that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with *express statute*, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law." (Italics ours.)

It was as a result of that decision that various Attorneys General urged upon Congress the enactment of a statute that would confer upon the United States the right to sue out writs of error in all criminal

cases to determine questions of law arising before legal jeopardy attaches. (Annual Reports of the Attorneys General for the years 1899, 1900, 1903, 1905, 1906.) It appears from the reports of the Committees (59th Cong., 2nd Sess., House Report 8113; Senate Report 5650) that these recommendations of the Attorneys General were largely responsible for the passage of the Act.

From the reports, as well as from the debates, it is evident that Congress was legislating to meet the very situation presented by this case. Every practical reason which led to the inclusion in the Criminal Appeals Act of that section relating to special pleas in bar requires that this provision be applied to the present case. The purpose of the Act was to ensure uniformity in the interpretation of the criminal law throughout the country, by giving to the Government an opportunity to review unfavorable decisions on points of law, and, in particular, to ensure that the statutes of limitations should be uniformly understood and applied. That Congress was well advised in this respect may be seen from the fact that of a total of eight cases so far brought up to this Court on pleas in bar under the third section of the Criminal Appeals Act, no less than six [1] have involved an

[1] *United States* v. *Kissel*, 218 U. S. 601; *United States* v. *Barber*, 219 U. S. 72; *United States* v. *Rabinowich*, 238 U. S. 78; *United States* v. *Oppenheimer*, 242 U. S. 85; *United States* v. *Noveck*, 271 U. S. 201; *United States* v. *Storrs*, 272 U. S. 652. The two which did not involve the statute of limitations were *United States* v. *Celestine*, 215 U. S. 278, and *United States* v. *Thompson*, 251 U. S. 407.

alleged erroneous application by the trial court of the statute of limitations. In three of these six cases the judgment below was reversed.

Unless Congress, by the Criminal Appeals Act, has accomplished such a purpose, this case illustrates that in this type of case we are back to the same lack of uniformity and to the same confusion as existed before the statute was enacted. Such a situation, we submit, is precisely that which the Criminal Appeals Act was intended to prevent; and we further submit that the language of that Act is plainly sufficient, in this case, to carry out the intention of its framers, for unlike the statute considered in the *Sanges Case* the Criminal Appeals Act provides for review, not "in any case," but "in all criminal cases."

(*a*) CONTEMPTS ARE CRIMINAL CASES WITHIN THE MEANING OF THE ACT

Under the decisions of this Court, *Gompers* v. *United States*, 233 U. S. 604; *Ex parte Grossman*, 267 U. S. 87; and *Michaelson* v. *United States*, 266 U. S. 42, criminal contempts are criminal cases within the meaning of this Act.

In the trial of criminal contempts, such as is here involved, the defendants are not entitled to a jury trial. In *Myers* v. *United States*, 264 U. S. 95, it was held that criminal contempts are not within the constitutional requirements of jury trial and venue, and in reliance upon that case defendants may urge that

criminal contempts such as these are not criminal cases. One answer to this is found in the historical treatise by Sir John Fox; "The History of Contempt of Court." He points out that until the 18th century criminal contempts not committed in the presence of the court were classed as crimes in England and were always punished in the common law courts by way of information, indictment and trial by jury. His thesis is that the present-day practice of proceeding by the summary process of attachment for contempt committed by a stranger out of court, and trying the defendant without the intervention of a jury, took its roots in an unsupported statement of Mr. Justice Wilmot in his undelivered judgment in *The King* v. *Almon*, Wilmot's Notes, 243, 254.

Certainly the nature and character of contempts has not been changed because the procedure of dealing with them has been changed. In fact, criminal contempts such as are here involved are still crimes in England and are triable by indictment, information, and trial by jury. Halsbury's Laws of England, Vol. 7, Section 604; 38 Law Quarterly Review, p. 197, Oswald on Contempt of Court, p. 6.

A further reply to the argument that contempts are not crimes because not triable by jury is found in the *Grossman Case, supra.* There the petitioner using the *Myers case* as an authority, argued that criminal contempts were not "offenses against the United States" within the meaning of the constitutional provision relating to pardons. The Court

there said, quoting from the *Gompers case, supra* (267 U. S. 116):

> It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury, etc., to persons charged with such crimes. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. *Robertson* v. *Baldwin*, 165 U. S. 275, 281, 282. It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. *If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.* (Italics ours.)

(*b*) THE THIRD SECTION OF THE CRIMINAL APPEALS ACT, RELATING TO PLEAS IN BAR, IS APPLICABLE TO CRIMINAL CASES BEGUN BY INFORMATION AS WELL AS TO THOSE BEGUN BY INDICTMENT

It being established that a criminal contempt is a criminal case within the meaning of the Criminal Appeals Act, the question arises whether the section relating to pleas in bar is broad enough to include this case, which was begun by information. Jurisdiction is invoked under the section of the Act which provides for appeals in all criminal cases—

> From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy

It is possible to urge that since the word "information" is not mentioned in the Criminal Appeals Act, it was not the intention of Congress to apply the provisions of that Act to "informations." Force is lent to this argument by the fact that in the two preceding sections there is specific reference to "indictments" and to decisions or judgments affecting "the invalidity or construction of the statute upon which the indictment is founded."

It is suggested that the word "indictment" used in the preceding sections should not be construed in its strict common law meaning, but in the broader meaning of any formal accusation (including information) by which criminal proceedings are begun. There is no lack of authorities to the effect that the words "indictment" and "indicted" in statutes and elsewhere may be construed as covering criminal

information. *United States* v. *Borger*, 7 Fed. 193; *Bailey* v. *Kalamazoo Publishing Co.*, 40 Mich. 251; Cf. *The Queen* v. *Steel*, L. R. 2 Q. B. D. 37, 1876–7.

Substance is added to the contention that both the Attorneys General and the Congress intended that the statute should apply as well to informations as to indictments by the case referred to as a reason for the enactment of the statute by Attorney General Griggs in his report to the Congress for the year 1900. Showing the importance of the subject, he cited the case of an information filed against a person charged with pasturing sheep on the Sierra Forest Reserve, in violation of the Act of June 4, 1897 (30 Stat. 35). The defendant filed a demurrer which was decided against the Government and in his report to the Congress (p. 40) the Attorney General pointed out that the Government had no right of appeal.

Whatever merit there may be in the above suggestion we base the right of the Government in the present case upon Section 3, which contains no words of limitation. If Congress did purpose by the insertion of the word "indictment" in the first two sections to limit the Government, then equally it could have done so in the third section. There is no such limitation because the language used in the two preceding sections, which may be construed as a limitation, is not included here. There being no such limitation and the opening paragraph of the Act being applicable to every section and including "all criminal cases," it seems clear that the Government has a right of review.

Support for this view is found in the decisions of this Court holding that the very section under discussion need not, like the two preceding sections, involve a decision or judgment which "is based upon the invalidity or construction of the statute upon which the indictment is founded." *United States* v. *Celestine*, 215 U. S. 278. In *United States* v. *Oppenheimer*, 242 U. S. 85, this Court assumed jurisdiction, though the judgment was not based on the invalidity or construction of the statute upon which the indictment was founded. In construing the section it pointed out that the limitations expressed in each of the two preceding paragraphs of the statute were not repeated in this paragraph, and that the language in *United States* v. *Keitel*, 211 U. S. 370, which was relied on by the defendants, referred only to the construction of the indictment in cases brought up by the Government under the earlier clauses of the Act.

Since, therefore, the section relating to pleas in bar is not limited to judgments based upon the invalidity or construction of the statute upon which an indictment is founded, we submit that it is likewise not limited as the two earlier sections may be, to indictments, but extends to criminal cases begun by information.

This Court has outlined the rule of statutory construction which is applicable to the Criminal Appeals Act. In *Gompers* v. *United States*, 233 U. S. 604, it was held that a statute limiting prosecution for crime "unless the indictment is found, or the information

is instituted within three years," applies to a criminal contempt not prosecuted by indictment. The reasoning of the Court in that case with respect to the statute of limitations applies to the Criminal Appeals Act in this case. At page 611 of the opinion it was stated:

> We come then to the construction of the statute. It has been assumed that the concluding words "unless the indictment is found or the information is instituted within three years" limit the offences given the benefit of the act to those usually prosecuted in that way, and the counsel for the petitioners were at some pains to argue that the charges of the committee amounted to an information; a matter that opens vistas of antiquarian speculation. But this question is not one to be answered by refinements and curious inquiries. In our opinion the proper interpretation of the statute begins with the substantive not with the adjective part. The substantive portion of the section is that no person shall be tried for any offence not capital except within a certain time. Those words are of universal scope. What follows is a natural way of expressing that the proceedings must be begun within 3 years; *indictment and information being the usual modes by which they are begun and very likely no other having occurred to those who drew the law.* But it seems to us plain that the dominant words of the act are "no person shall be prosecuted, tried, or punished for any offence not capital" unless. (Italics ours.)

It is, therefore, submitted that the section relating to pleas in bar is specifically applicable, in the very words of the Act, to "all criminal cases"—to those begun by information as well as to those begun by indictment.

(*c*) THE "MOTION TO DISMISS" FILED ON BEHALF OF DEFENDANTS BELOW WAS A SPECIAL PLEA IN BAR WITHIN THE MEANING OF THE CRIMINAL APPEALS ACT

Counsel below filed what they termed a "motion to dismiss" the charges against these defendants, on the sole ground "that it appears on the face of the information that this proceeding for contempt was instituted more than one year after the date of the alleged act or acts complained of." (R. 45.)

The Government filed a demurrer to this motion, in which demurrer the motion was treated as a special plea in bar. (R. 46.) The court entered judgment sustaining the motion. In the court's opinion (R. 46, 54), the motion was termed a special plea in bar. The Government now submits (and we understand that defendants' counsel will oppose us on this point) that its action, as well as that of the trial Judge, was correct with respect to the true nature of the plea, and that the so-called "motion" filed by the defendants was in fact what the trial judge called it—a special plea in bar within the meaning of the Criminal Appeals Act.

Under the Criminal Appeals Act the question whether the motion filed below was a special plea in bar is a question to be determined not by form,

but by substance. *United States* v. *Thompson*, 251 U. S. 407. What counsel call the plea is immaterial. It has been held that a so-called "motion to quash" an indictment upon the ground that it formerly had been adjudicated that a previous indictment was barred by the Statute of Limitations was a plea in bar within the meaning of this Act. *United States* v. *Oppenheimer*, 242 U. S. 85. Cf. *United States* v. *Rabinowich*, 238 U. S. 78. It has further been held that a so-called "plea in abatement" setting up the statute of limitations was a plea in bar within the meaning of the Criminal Appeals Act. *United States* v. *Barber*, 219 U. S. 72; *United States* v. *Rabinowich*, 238 U. S. 78.

In some older cases, it is true, language may be found to indicate that the common function of a special plea in bar was to set up new matters *dehors* the record. This does not mean, however, that every special plea in bar, to fulfill its definition, *must* thus set up new matter. The language in the older cases should, we submit, be considered in the light of the earlier law. At common law, only four kinds of special pleas in bar (namely, autrefois convict, autrefois acquit, autrefois attaint, and pardon) were recognized in criminal cases; and each of these four did, in fact, serve to set up new matter. At common law there were no statutes of limitations in criminal cases; and pleas in bar based upon such statutes were accordingly unknown. In modern practice, on the contrary, as is shown by many cases in this Court, the defense of the statute of limitations may regularly

and properly be raised by a special plea in bar; and such a plea need not (and frequently does not) set up new matter.[2] The failure to set up new matter has never been held to make the plea defective or to change its essential nature.

While, therefore, the "motion to dismiss" filed by defendants below might not have been properly worded as a special plea in bar and might have been technically deficient in form, yet the "motion" in substance and effect was a special plea in bar within the meaning of the Criminal Appeals Act and the cases above cited. If the motion to dismiss is not a special plea in bar, what is it? It can not be regarded as a demurrer, for this Court has held that the defense of the statute of limitations in a criminal case must be raised either by special plea or under the general issue, and *can not* be raised by demurrer. *United States* v. *Cook*, 17 Wall. 168. Nor can it be regarded as a motion made at the trial under the general issue,[3] for the trial had not yet begun, and was not scheduled

[2] The records of this Court disclose that in each of the following cases where special pleas in bar were interposed, based upon the statute of limitations, the plea did *not* set up new matter. *Gompers* v. *United States*, 233 U. S. 604 (Oct. Term 1913, Nos. 574 and 640); *United States* v. *Rabinowich*, 238 U. S. 78 (Oct. Term 1914, No. 748); *United States* v. *Noveck*, 271 U. S. 201 (Oct. Term 1925, No. 169).

[3] The fact that pleas of not guilty were already on the record when the special plea was filed has no special significance, since under the liberal rules of modern practice, double pleading is permissible even in criminal cases. *Thompson* v. *United States*, 155 U. S. 271, 274, citing Bishop, Crim. Proc. (2nd ed.) Vol. 1, Sec. 750–753.

to begin until some weeks after this plea was interposed. Such testimony as had been taken before the Special Examiner was taken—

> in anticipation of trial and in preparation therefor * * *, at which trial either the defendants or the Government should be privileged to introduce additional testimony and to rely for prosecution or defense upon such portions of the testimony theretofore taken, transcribed, and lodged with said judge as might be desired * * *. (R. 63.)

Such a trial has never yet taken place. There having been no trial and neither side having designated or even indicated the testimony to be relied on, the court can not be regarded as having considered, under the general issue, that the evidence proved the truth of the allegations contained in the "motion to dismiss" or special plea in bar.

We submit, therefore, that the Trial Judge was right when he described this "motion" in the alternative as a special plea in bar (R. 54), and that accordingly the decision upon the plea is reviewable under the Criminal Appeals Act.

(*d*) THE DEFENDANTS IN ERROR HAVE NOT BEEN IN JEOPARDY WITHIN THE MEANING OF THE CRIMINAL APPEALS ACT

Normally, jeopardy is reached only after the full jury is impanelled and sworn and added to the other branch of the court and the preliminaries to the trial of the issues of fact have been disposed of. *Taylor* v. *United States*, 207 U. S. 120. This result

seems to have been reached upon the theory that there has been no jeopardy until the defendant has been put on trial on an issue of fact. "But, protection being against a second trial for the same offense, it is obvious that where one *has been tried* before a competent tribunal having jurisdiction he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit." (Italics ours). *Kepner* v. *United States*, 195 U. S. 100, at page 128. Jeopardy in such a case would seem to attach when the court sits for the trial of the case, but only *after* the preliminaries to the trial of the issues of fact have been disposed of.

The case at bar is a criminal contempt. It was to have been tried before the court without a jury. The court appointed a special examiner to hold hearings and to take testimony in various States. The special examiner, however, had no power to rule on the admission or exclusion of evidence. She was obliged to receive everything, relevant or irrelevant, which might be offered by either side and to take it down in shorthand and transcribe afterwards in typewritten form. A hearing before such an examiner constitutes no part of the trial. *United States* v. *United Shoe Machinery Co.*, 198 Fed. 870. Testimony was taken before the special examiner but this testimony was taken as the trial judge declared—

> in anticipation of trial and in preparation therefor * * *, at which trial either the defend-

> ants or the Government should be privileged to introduce additional testimony and to rely for prosecution or defense upon such portions of the testimony theretofore taken, transcribed, and lodged with said judge as might be desired * * *. (R. 63.)

The "motion to dismiss" and the Government's demurrer thereto were filed and argued long prior to the date set for the trial of the cause in open court. (R. 63.)

The defendants, therefore, have never been in jeopardy; for they have never been tried by a judicial tribunal having jurisdiction. While the transcript of the testimony taken before the Special Examiner was lodged with the judge of the court in his official capacity, it was never submitted to a judicial tribunal sitting as a trier of the facts. Neither party had designated or concluded the evidence to be relied on at the trial. Neither party had had the opportunity to present or to argue its objections to the reception and consideration of irrelevant or prejudicial material taken before the Examiner. Where the tribunal has never been in a position to receive or consider evidence, there has been no jeopardy.

II

UPON THE MERITS THE DISTRICT COURT ERRED IN HOLDING THAT THE PERIOD OF LIMITATION APPLICABLE TO THIS CASE WAS ONE YEAR, AND NOT THREE

1. Section 25 of the Clayton Act, imposing a one-year period of limitation in certain classes of contempts, has no application to criminal contempts prosecuted by the United States

By the decision in *Gompers* v. *United States*, 233 U. S. 604, it was settled that criminal contempts are governed by the general three-year period of limitation applicable to non-capital crimes under R. S. 1044. (U. S. C. Title 18, Sec. 582.) The question here to be considered is whether that decision has been overturned by the passage of the Clayton Act.

Section 25 of the Clayton Act (Act of Oct. 15, 1914, c. 323, 38 Stat. 730, 740; U. S. C. Title 28, Sec. 390) at first sight appears to support the position of the defendants, for it provides—

> That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

The Government submits, however, that this section has no application whatever to the case at bar,

for the immediately preceding section (Sec. 24 of the Act) expressly provides—

> *That nothing herein contained shall be construed to relate* to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, *nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States,* but the same, *and all other cases of contempt not specifically embraced within section twenty-one of this Act,* may be punished in conformity to the usages at law and in equity now prevailing. (Italics ours.)

In other words, Section 24 of the Clayton Act provides that "*nothing herein contained*" (i. e. the one-year period of limitations) shall apply *either*—

(i) to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, *or*

(ii) to contempts committed in disobedience of a decree entered in a suit brought by the United States, *or*

(iii) to *any* type of contempt "not specifically embraced" within Section 21.

Section 21 describes a single class of contempt. This class includes *only* wilful disobedience of any order or decree of the court by the doing of any act forbidden by the decree (as opposed to the leaving *undone* of some act specifically required to be done) and only if the act constitutes also a criminal offence

under the laws of the United States or of the State where the act is done.

The narrow scope of these sections of the Act was clearly recognized in *Michaelson* v. *United States*, 266 U. S. 42, 66:

> It (the Clayton Act) is of narrow scope, dealing with the single class where the act or thing constituting the contempt is also a crime in the ordinary sense. It does not interfere with the power to deal summarily with contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, *and is in express terms carefully limited to the cases of contempt specifically defined.* Neither do we think it purports to reach cases of failure or refusal to comply affirmatively with a decree—that is to do something which a decree commands—which may be enforced by coercive means or remedied by purely compensatory relief. (Italics ours.)

In other words, the scope of the contempt provisions of the Clayton Act is limited to the single narrow class of contempts set forth in Section 21, as qualified by Section 24. To fall within this class, a case must possess four distinct characteristics.

> (I) The contemptuous act must consist in doing something which a decree says must not be done, as opposed to leaving *undone* something which a decree says must be done;
>
> (II) The doing of the act must constitute a criminal offense under State or Federal law;

(III) The contempt must NOT have been committed in the presence of the court, or so near thereto as to obstruct the administration of justice;

(IV) The original decree, which the defendant is accused of violating, must NOT have been entered in a suit brought by the United States.

If any one of these four conditions is not fulfilled, the contempt provisions of the Clayton Act (including the one-year period of limitation) do not apply, and the case is governed by the general law applicable to all other types of contempt.

The case at bar, it is clear, does not fulfill the fourth of these conditions; for the defendants are specifically charged with disobeying various provisions of a decree entered in 1916 *at the suit of the United States.* This fact brings the case squarely within the language of Section 24, which says that "nothing herein contained" shall be construed to apply to such a case.

The problem is therefore to determine the meaning of the phrase "nothing herein contained." Unless it can be shown that the application of this phrase does *not* extend to Section 25, the Government's contention must prevail.

The word "herein" in a statute may refer to any one of three things; (a) it may refer to the section in which it occurs, or (b) it may refer to the title, chapter, or other subdivision of the Act in which it occurs, or (c) it may refer to the whole Act.

In the present case, alternative (a), at least, is out of the question; for if we should construe "nothing herein contained" to mean, "nothing contained in this Section," we should have an enactment to the effect that "nothing contained in Section 24 shall apply to Section 24," which is nonsense.

Alternative (b) is, *prima facie*, out of the question also; for the Clayton Act is not divided into either chapters or titles. The District Court, however, declared in its opinion (R. ——), that the Clayton Act is a congeries of enactments dealing with a number of different subjects—monopolies, interstate commerce, labor injunctions, and lastly, contempts. From this undoubted fact the court proceeded to deduce the erroneous inference that Sections 21–24 constituted a separate title (though not labeled as such) which dealt with the procedure in contempt cases, and that the word "herein" contained in Section 24 must be restricted in its application to the three preceding sections contained in that "Title," to the exclusion of Section 25. In making this decision the District Court, we submit, ignored several very important facts. In the first place, it ignored the fact that Sections *21 to 25* (not *21 to 24*) of the Clayton Act formed a single unit throughout their entire legislative history, from the time when they were first introduced in the Sixty-second Congress under the name of the Clayton Contempt Bill (H. R. 22591, 62nd Cong., 2nd Sess.). In the second place, it ignored the fact that under the new United States Code, Congress has expressly grouped

Sections 21 to *25* (not 21 to *24*) together as a unit, apart from the remainder of the Clayton Act. Those two points are considered in more detail hereafter (pp. 33 and 39).

This holding, moreover, ignores the plain meaning of words. It proceeds upon the theory that the phrase "nothing *herein* contained" is to be interpreted as if it read "nothing *hereinbefore* contained." Such an argument, we submit, can not be sustained. "Herein" and "hereinbefore" are two very different words with very different meanings. No ground exists for supposing that Congress deliberately mistook the meaning of the words it employed, or for twisting the language of the statute to obtain a construction which is at variance with the literal and simple meaning.

There have been many cases construing the word "herein," as used both in statutes and in private documents. In no case, so far as counsel for the Government have been able to discover, has it ever been held that "herein" is synonymous with "hereinbefore," or that the application of "herein" is to be limited to what has gone before it. Several cases, in fact, hold precisely the contrary. *Iasigi* v. *Iasigi*, 161 Mass. 75, 79; *State ex rel Smiley* v. *Glenn*, 54 Tenn. 472. *Cf. Arthur's Executors* v. *Butterfield*, 125 U. S. 70, 76; *Arthur's Executors* v. *Vietor*, 127 U. S. 572, 576; *Smythe* v. *Fiske*, 23 Wall. 374, 381; *In re Berkowitz* (D. C. E. D. Pa.), 143 Fed. 598; *In re Pearsons*, 98 Cal. 603, 608; *May* v. *Simmons* (C. C. D.

Mass.), 4 Fed. 499; *McKibben* v. *Lester*, 9 Ohio St. 627.

2. The legislative history of the Clayton Act supports the Government's contention

It has been argued above that the one-year period of limitation set up by Section 25 of the Clayton Act has no application to criminal contempts prosecuted by the United States, by reason of the exceptions contained in Section 24. This contention is amply supported by a study of the legislative history of the Act, from which two facts appear: first, that Sections 21 to 25 (not 21 to 24) of the Act at all times formed a single unit of legislation, and second, that the expressed intention of the framers of the Act was to extend the application of Section 24 to include Section 25.

When the Clayton Act was reported by the House Committee on the Judiciary, the present Section 25 was Section 23; and the present Section 24 was Section 22. In the original form of the bill, these were the last two sections. Their language, and the order in which they were placed, remained the same throughout the progress of the bill. The only substantial alteration made to this part of the Act consisted in the addition by the Conference Committee of the present Section 26, which deals with the severability of the different sections in case any one of them should be held unconstitutional. (Conference Report, 63rd Cong., 2nd Sess., House Report No. 1168.)

The House Committee Report accompanying the bill (63rd Cong., 2nd Sess., House Report No. 627) sheds no direct light on the questions now at issue. It does point out, however (p. 21), that the contempt sections of the Clayton Act (namely, Sections 21 to 25) are merely a repetition of the bill introduced by Mr. Clayton in the preceding Congress, to which reference is made below.

In the debates in the House on the Clayton Act, Mr. Webb (a member of the Judiciary Committee in charge of the bill) declared:

> Section 22 (the present Section 24) provides that nothing contained *in this bill* shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of the United States.
>
> Cong. Rec., Vol. 51, Part 9, p. 9075. (Italics and Parenthesis ours.)

The phrase "nothing contained *in this bill*," we submit, of necessity extends to the limitation provisions then contained in Section 23 (the present Section 25).

In the preceding Congress (the Sixty-second) Mr. Clayton had sponsored two bills, one dealing with the practice in injunction cases, and one dealing with the practice in contempt cases. These were familiarly known as the Clayton Injunction Bill and the

Clayton Contempt Bill. Their provisions were subsequently embodied in Sections 17–25 of the Clayton Act.

The Clayton Contempt Bill was H. R. 22591, 62nd Congress, 2nd Session. It passed the House and was referred to the Senate Judiciary Committee; but the Sixty-second Congress came to an end without the Senate Judiciary Committee reporting the bill. The bill took the form of an addition to the Judicial Code, to provide five new sections, 268a, 268b, 268c, 268d, and 268e. These five sections were the same as the present Sections 21 to 25 of the Clayton Act. Section 268d was identical with Section 24 of the Clayton Act; and Section 268e was identical with Section 25. In the House Committee Report accompanying this bill occurs the following statement (House Report No. 613, p. 2, 62nd Cong., 2nd Sess.):

> Section 268d (the present Section 24) excepts from the operation *of the act* contempts in the presence of the court, or so near thereto as to obstruct the administration of justice, and contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of the United States, and provides that in the excepted cases as well as in all other cases not specifically embraced within section 268a, the punishment shall be in conformity to the usages at law and in equity now prevailing.
>
> Section 268e bars proceedings for contempt unless begun within one year from the date of

> the act complained of, and preserves the right of criminal prosecution, notwithstanding any proceeding and punishment for the contempts covered by the bill. It also excepts from the provisions of the bill any proceedings for contempt pending at the time of its passage.

Finally, Mr. Clayton himself, in the debate on the Clayton Contempt Bill in the Sixty-second Congress, not only indicated the same intention, but gave his reasons and his explanations when he said in debate:

> The next objection that was made to it was that it would probably detract from the power of the courts to enforce their decrees of dissolution of combinations denounced by the antitrust law. I violate no confidence when I say that that was the criticism of the chief legal officer of the present administration, Attorney General Wickersham. *We have met that objection by providing in this bill that it shall not apply in any case where the United States is the party complainant.* Every man in this House knows that in all proceedings under the Sherman antitrust law the United States is necessarily, by the terms of the statute, the complainant. So we answered that criticism in this bill. (Italics ours.) (Cong. Rec., Vol. 48, Part 9, page 8778.)

It is apparent, therefore, in the first place that Sections 21 to 25 of the Act (and not merely Sections 21 to 24), have always constituted a single related unit of legislation, from the time when they were first introduced as the Clayton Contempt Bill. If the Clayton Act is to be divided into "titles" at all, we

submit that the proper division includes Sections 21 to 25 as a group, and can not stop short with Section 24. If this be so, then the application of Section 24 will extend at least to the whole portion or "title" of the Act, which deals with contempts—namely to Sections 21 to 25. There is no reason, in fact, why it should not extend to the whole statute.

In the second place, it is apparent that the whole purpose of the framers of the Act was to set up a double standard with respect to contempt cases. The Clayton Contempt Bill (Sections 21–25 of the present Clayton Act) was to apply only in certain types of cases arising out of litigation.[4] These types are narrowly enumerated in the Act. The old standard of existing law was to continue to apply in all other cases, including all those in which the United States was a party to the original proceeding.

In all such other cases, no right to trial by jury exists under Section 22. That much is clear from the express language of Section 24. But that is not all. No warrant exists for supposing that Congress intended to make a distinction between the two classes of contempts upon the sole ground that trial by jury should apply to the one class and not to the other. On the contrary, we submit, the history of the Act shows that Congress intended to legislate fully as to all aspects of the single class of contempts

[4] This Court has already given effect to this intent of the framers of the Act by its interpretation of another section (Sec. 20) of the Act. *Duplex Printing Press Company* v. *Deering*, 254 U. S. 443, at p. 471–2.

set out in the Act—to legislate with respect not merely to the method of trial, but also to the whole procedure of trial, the punishment, *and the statute of limitation*. The Clayton Act, in other words, sets up a single and complete Code of Procedure with respect to a single class of contempts. It does not attempt to legislate with respect to anything else. The right to trial by jury is not the only distinguishing mark of the contempts enumerated in Section 21. By Section 22 the punishment for such contempts is limited to a fine of $1,000 and imprisonment for six months. No such limitation applies to other types of contempt. By Section 23 the accused in such cases is given an absolute right to bail after conviction—a right which does not exist in other cases. Similarly, we submit, by Section 25 the accused is given the benefit of a special period of limitation, shorter than that prescribed by general law, and applicable only to the specific class of contempts with which Congress was then attempting to deal. The present case is not one of this class.

It may be argued that it is unreasonable to apply one statute of limitations to certain types of cases arising between private litigants, and a different one to other cases, including all cases where the United States is a party, and that for this reason the statute should be construed as fixing a one year period of limitations in all cases.

Such an argument, of course, can not be sustained in the face of a clear statutory provision to the contrary. If Congress sees fit to establish, with respect

to limitation, a distinction between different classes of contempt cases, its word is final. In this connection, it must be remembered that no statutes of limitation bind the Government unless the intention to do so is clearly and unequivocally expressed *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456; *United States* v. *Whited & Wheless, Ltd.*, 246 U. S. 552, 561; *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120, 125.

In enacting Section 25 of the Clayton Act, Congress might possibly have been content with silent reliance upon the principle that no statute of limitations binds the sovereign unless the intention to bind it is clearly expressed. But out of abundant caution, Congress went further. It has, in the language of Mr. Clayton, affirmatively expressed its intention that the Act "*shall not apply in any case where the United States* is the party complainant." That intention has been clearly embodied in Section 24.

3. The contention of the Government is supported by the language of the United States Code

Additional light is thrown upon the point at issue by an examination of the provisions of the new United States Code (44 Stat. Part I).

In the rearrangement of the permanent statutes of the United States embodied in the Code, Sections 21 to 25 of the Clayton Act, still constituting a single unit of legislation, have been placed together and are now found as Sections 386–390 of Title 28 on the

Judiciary. Section 389 of Title 28, replacing Section 24, significantly provides;

> *Nothing contained in sections 386 to 388 and 390* of this title shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section 386 of this title, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914. (Italics ours.)

Section 390, it will be noted, is the section imposing the one-year period of limitation, and is reenacted *verbatim* from Section 25 of the Clayton Act. Section 389, therefore, expressly provides that the one-year period of limitation embodied in Section 390 shall *not* be applicable to contempts arising out of cases where the United States was the original complainant, i. e., to cases such as the case at bar.

The enacting clause of the Code (Act of June 30, 1926, c. 712, 44 Stat. 1) states that the Code is designed to establish *prima facie* the law; but if there is an inconsistency between the language of the Code and the language of the old law, the latter is to prevail.

In the case at bar, no inconsistency exists between Section 24 of the Clayton Act and Section 389 of

Title 28 of the Code. On the contrary, we submit that the language of the Code, strengthening, as it does, the arguments of the Government, must be construed as a persuasive declaration of the existing law.

A general revision or codification of statute law is not lightly to be read as making a change in the law. *United States* v. *Sischo*, 262 U. S. 165, 168; *United States* v. *Ryder*, 110 U. S. 729, 740; *In re Derinza*, 229 Mass. 435, 442.

In the case of the United States Code, it is clear that neither the revisors nor the Congress intended to alter the existing law in any respect, however slight. The Committee Reports accompanying the Code are specific on this point. (House Report No. 900 and Senate Report 832, 69th Cong., 1st Sess.)

It is submitted, therefore, that the language of Section 389 of the Code should not be construed as making any change whatever in existing law. On the contrary, it should be construed as an interpretation placed by Congress itself upon its own prior enactments. As was said in *United States* v. *Freeman*, 3 How. 556, 564:

> If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; Lord Raym., 1028; and if it can be gathered from a subsequent statute in *pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its

meaning, and will govern the construction of the first statute.

Even if the language of the Code be regarded, not as a legislative interpretation of existing statutes, but merely as the deliberate opinion of the revisors upon the meaning of existing law, that opinion may nevertheless be properly considered. *Continental Insurance Co.* v. *Simpson* (C. C. A. 4th), 8 F. (2d) 439, 443. When the revisors and Congress altered the language of the statute from "*nothing herein contained*" to "nothing contained in sections 386 to 388 and 390," they were neither adding new law nor changing the old. They were merely restating, in a form altogether free from ambiguity, the law as it already was.

CONCLUSION

It is, therefore, respectfully submitted that the period of limitation to be applied to all charges in the present case is three years and not one, and that the judgment of the District Court be reversed.

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MARCH, 1928.

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CHARLES ELMORE CRO
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No. 723

In the Supreme Court of the United States

October Term, 1927

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

JACOB A. GOLDMAN, et al.

BRIEF FOR THE DEFENDANTS IN ERROR

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No. 723

In the Supreme Court of the United States

October Term, 1927

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

JACOB A. GOLDMAN, et al.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE DEFENDANTS IN ERROR

STATEMENT

We can, in general, accept the Government's statement. We wish, however, to supplement it with the following:

The Government has printed only Sections 21 through 25 of the Clayton Act. It is our contention

that Section 25 means what it says in providing that no proceeding for contempt may be instituted unless begun within one year. It is the Government's position that this section is limited by Sections 21 through 24. Whether Section 25 is to be tied in with these sections or whether, in view of the whole Act, Section 25 is otherwise to be construed, is one of the important questions to be presented. It is, therefore, necessary that the entire Act be before the Court, and we have accordingly printed it as appendix A to this brief.

To give a clear picture of the situation existing at the time that the decision appealed from was made, the following additional facts should be noted: The Special Examiner appointed by the Court to take the testimony had taken 3050 pages of testimony over a period of approximately a year, and for this purpose had sat in over twenty States, from Massachusetts to California, and from Wisconsin to Texas (R. 41, 42 and 63). Following the filing of this testimony with the Court, a stipulation was filed under date of September 28, 1927 dismissing all but thirty-two charges out of a total of over one hundred and fifty charges, and providing that no further testimony should be taken before the Special Examiner (R. 43, 44). This left twenty-two defendants in the case, out of over ninety who were originally cited. On November 4, 1927, nineteen of these remaining defendants moved to dismiss twenty-six of the remaining charges (one of the defendants subsequently withdrawing his motion with respect to one charge), (R. 45, 55). The Government raised no objection to the hearing and determination of the motion, but opposed it merely upon the merits.

The Government states that the District Court designated the motion as a special plea in bar. In point of fact, the District Court in its opinion did not undertake to decide the nature of the defendants' pleading. The Court headed its opinion: "Upon motion to dismiss and demurrer to motion." The Opinion starts: "By motion to dismiss certain charges contained in the information in contempt and demurrer to this motion, treating the same as a special plea in bar," (R. 46). In its Judgment, the District Court found "that said motion is well-taken and should be sustained," and again, "that the motion filed by certain defendants * * * be and the same hereby is sustained" (R. 54, 55).

SUMMARY OF ARGUMENT

The defendants' brief will, in general, follow the order of the Government's brief, taking up the issues raised by the Government in the same order. The defendants contend:

(1) This Court has not jurisdiction of this case, because (a) a proceeding in contempt is not a criminal case within the meaning of the Criminal Appeals Act; (b) the defendants' motion to dismiss was not a special plea in bar within the third subdivision of the Act; and (c) the defendants were in jeopardy.

(2) Section 25 of the Clayton Act means what it says in providing that no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; and the District Court was correct in holding that the provisions of Section 25 were not limited by the provisions of Section 24.

ARGUMENT

I.

THIS COURT IS WITHOUT JURISDICTION IN THIS CASE

Admittedly, this Court's jurisdiction can be sustained only under the Criminal Appeals Act of March 2, 1907, which is set forth at length in the Government's brief (pp. 2, 3).

Decisions appealable thereunder are grouped into three subdivisions. A brief examination of the provisions of these three subdivisions is necessary.

The first permits an appeal from a decision quashing, setting aside or sustaining a *demurrer* to any indictment, where the decision is based upon the *invalidity, or construction of the statute upon which the indictment is founded.*

The second subdivision permits an appeal from a decision arresting a judgment of conviction for *insufficiency of the indictment,* again where the decision is based upon the *invalidity or construction of the statute upon which the indictment is founded.*

The third subdivision allows an appeal from a decision "sustaining *a special plea in bar,* when the defendant has not been put in jeopardy."

At the outset, it will be noted that the first subdivision deals with the insufficiency of the indictment, raised by demurrer, and the second with the insufficiency of the indictment, raised on motion in arrest of judgment, and both are limited to certain questions based upon the statute on which the indictment is founded. On the other hand, the third subdivision deals with the defendants' plea, viz., a special plea in bar. The limitation on the other subdivisions is no

longer appropriate, and has been dropped, and in place thereof is the limitation that the defendant must not have been put in jeopardy.

Admittedly, the jurisdiction of this Court cannot be sustained under the first or second subdivisions, because the decision was not based upon the validity or construction of the statute upon which the indictment was founded. The Government must bring itself within the third subdivision, or the jurisdiction of this Court fails. Three conditions must coexist to sustain the jurisdiction of this Court: (1) this proceeding must be a criminal case, to come within the statute; (2) the decision below must have sustained a special plea in bar, to come within subdivision 3; and (3) there must have been no jeopardy, so as to avoid the limitation of subdivision 3. If any one of these conditions does not exist, then there is no jurisdiction. We urge that none of the conditions exists.

The Government first argues that its Attorneys-General had pressed on Congress the view that the Government should always have the right of appeal from all unfavorable decisions on points of law where the defendant has not been in jeopardy; and that such a result is so desirable that this Act should be construed to produce that result. Obviously, if Congress had meant to grant the request of the Department of Justice in this regard, it could have done so in a short, simple statute with comprehensive language, instead of the statute that was actually passed. The very fact that the Attorneys-General had pressed on Congress the alleged defects in the law (e. g., with respect to informations against pasturing sheep on the reserves), defeats instead of aids the Government's argument; for, clearly, Congress then had those proceedings in

mind and failed to use language in the Act broad enough to cover them. If these matters had not been brought to Congress' attention, there might have been some argument that Congress accidentally overlooked them; but the Government points out that the Attorneys-General had for years been urging Congress for a comprehensive Criminal Appeals Act, and the fact that Congress passed no broader statute is most significant as to Congress' intent.

Moreover, we challenge the Government's assertions as to the intent of Congress, and annex to our brief (Appendix B) excerpts from the Congressional proceedings which make it apparent that Congress had no thought of contempt proceedings when it enacted this statute.

Furthermore, this Court has never so construed the Criminal Appeals Act. At common law, the Government would unquestionably have had no right of appeal. Secondly, this Court is a court of limited jurisdiction, and this statute grants it jurisdiction in a narrowly limited class of cases. Thirdly, the right of appeal therein given is unique, in that it provides for an absolute right of appeal from the District Court to this Court. Thus, the statute is in derogation of the common law in broadening the power of the Government against the right of the citizen; and it is a very limited statute giving an extraordinary right of appeal in very special and carefully-defined circumstances. The statute must, therefore, be strictly construed, and this Court has consistently so held. (*United States* v. *Weissman,* 266 U. S. 377; *United States* v. *Keitel,* 211 U. S. 371, 399).

(a) THIS PROCEEDING IS NOT A CRIMINAL CASE, WITHIN THE MEANING OF THE CRIMINAL APPEALS ACT

We deal here with the points covered under both Sections (Ia) and (Ib) of the Government's brief, as they are both different aspects of the same point.

This Court has consistently held that a proceeding in contempt is *sui generis*. Of course, at common law this writ of error could not have been brought. (*Ex parte Fisk*, 113 U. S. 713, 718). The question here presented is not the general nature of a proceeding in contempt, but merely whether it is a criminal case within the meaning and intent of this particular statute, giving this exceptional right to appeal.

The question has never been expressly decided by this Court. As we shall presently point out, the three cases relied upon by the Government are not in point. We urge, however, that this Court has, in fact, decided this question by its recent decision in *Myers* v. *United States*, 264 U. S. 95. In that proceeding for criminal contempt, the defendant challenged the jurisdiction of the District Court, on the ground that the acts occurred in another division of the District, and that, therefore, under the provisions of the Sixth Amendment to the Constitution and of the Judicial Code, the Court that tried him was without jurisdiction. That Amendment contains the language "criminal prosecution"; and Section 53 of the Code refers to "all prosecutions for crimes or offenses." This Court, in denying the claim of the defendant, held:

> "None of the cited Code sections makes specific reference to contempt proceedings." (p. 103.)

(Neither does the Criminal Appeals Act make reference, specific or otherwise, to contempt proceedings).

This Court concluded its opinion as follows:

> "While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our Government proceedings to punish such offenses have been regarded as *sui generis* and not 'criminal prosecutions, within the Sixth Amendment or common understanding."

In short, this Court held that for the purpose of determining the jurisdiction of the District Court to try the case, a proceeding in criminal contempt was not a criminal prosecution within the meaning of the Sixth Amendment or the Judicial Code. We urge that it inevitably follows that a proceeding in criminal contempt is not a criminal case within the meaning of the Criminal Appeals Act granting exceptional jurisdiction to this Court to hear a limited class of appeals.

The phrase "criminal case" is no broader than "criminal prosecution." A "prosecution" is "the act of conducting any judicial proceeding" or "such proceeding itself" (Anderson's Law Dictionary). The Criminal Appeals Act manifestly cannot apply except that there first be a "criminal prosecution."

Moreover, the decision in *Myers* v. *United States* is still further in point. This Court rested its decision in part upon the language of Section 25 of the Clayton Act—the section upon whose construction the decision below was based. That section reads:

> "That no *proceeding for contempt* shall be instituted against any person unless begun within

> one year from the date of the act complained of; nor shall any such *proceeding* be a bar to *any criminal prosecution* for the same act or acts * * *." (Italics ours.)

This Court specifically pointed out:

> "* * * It also clearly recognizes the distinction between 'proceeding for contempt' and 'criminal prosecution.' "

This is of particular importance because the Clayton Act was passed by Congress seven years after the Criminal Appeals Act; and this section shows the careful distinction made between a proceeding for contempt and a criminal prosecution.

Elsewhere in the Clayton Act we find the same distinction carefully observed. Thus, in the sections of that Act authorizing trial by jury in certain proceedings for criminal contempt, it is expressly provided:

> "That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases * * *." (Section 23.)

From this it is plain that Congress recognized the difference between proceedings in criminal contempt and criminal cases; and further, that Congress, although it provided in Section 23 of the Clayton Act that a review of the limited class of cases there dealt with might be had as in a criminal case, yet, when it came to Section 25, wherein criminal contempts are broadly dealt with, did not provide that other criminal contempts should be subject to review as criminal

cases. Congress had in mind criminal contempts generally, the difference between criminal contempts and criminal prosecutions, and the necessity of providing for review. Congress could readily have provided in Section 25 that all proceedings in criminal contempt should, for the purposes of review, be treated as criminal cases, if that is what Congress intended. The intent of Congress is well shown both by what it said and by what it failed to say.

Reverting again to *Myers* v. *United States* (supra), we find that this Court pointed out that contempt proceedings were not criminal prosecutions within "common understanding." Certainly, words in so special a statute as the Criminal Appeals Act are not to be given a construction that would extend their meaning beyond "common understanding."

In the *Myers* case, the Solicitor-General successfully argued before this Court as follows:

> "Contempt is analogous to crime.
>
> But it differs from crime in numerous and important particulars.
>
> Contempts are generally classified as civil and criminal. But even those which are clearly criminal in character, differ from ordinary crimes.
>
> 1. Criminal contempts are tried summarily.
>
> 2. There is no right of trial by jury, save as specifically provided by statute. Contempts are not 'crimes' within Art. 3, Sec. 2, cl. 3 of the Constitution, which provides that: 'The trial of all crimes, except in cases of impeachment, shall be by jury * * *.' Nor are they 'criminal prosecutions' within the meaning of the Sixth Amendment.
>
> 3. Courts having no criminal jurisdiction may nevertheless punish for criminal contempt.

4. The defendant may, without a waiver or consent, be sentenced in his absence.

5. An act which is a contempt of court and also a crime may be punished summarily and by indictment; and conviction or acquittal in one will not bar the other.

6. A defendant is not entitled to be confronted with the witnesses against him in open court.

7. It is doubtful whether immunity from self-incrimination afforded by the Fifth Amendment to defendants in 'any criminal case' will relieve a defendant in contempt from examination as a witness, so long as he is not required to incriminate himself in any matter other than the contempt inquired into.

8. Finally, what is of particular importance in the case at bar—the court against which a contempt is committed has exclusive jurisdiction to punish it, and no change of venue can be allowed.

Because of these points of difference this Court, while recognizing their criminal aspects, has held that contempt proceedings are neither civil nor criminal, but are *sui generis.*" (Citations omitted.)

The Solicitor-General successfully urged this Court "not to construe the statutes which fix the venue of criminal offenses so as to embrace contempts." There the Government was dealing with the Judicial Code —a broad, general statute; here we are dealing with a special and limited statute. Certainly if contempts are not to be treated as criminal cases for the determination of jurisdiction under the broad statute, they should not be so treated for the purposes of jurisdiction on appeal under the specifically limited statute.

The Government in its brief (under Point [Ib], page 17), refers to the fact that the third subdivision does not use the word "indictment," while the first

and second subdivisions do, and seeks to draw comfort therefrom by pointing out that this subdivision is not subject to the argument that may be raised against the other subdivisions on account of the use of that word.

The Government's argument is too superficial. The real question is, what is the meaning of the words "criminal cases" in the opening sentence of the statute, which sentence marks the boundaries of the subject-matter with which the whole statute deals. Unless the proceeding is a criminal case, it does not come within the statute; the succeeding subdivisions still further limit the right to appeal, after it has been determined that the proceeding is a criminal case. The Act again and again uses the words "indictment," "verdict," and similar language, which are clearly and peculiarly applicable to criminal cases in the ordinary acceptance of the words but which have no application whatsoever to proceedings in contempt. The third subdivision does not use the word "indictment" because the subdivision is dealing with the defendants' pleadings, and the word "indictment" would have no place therein. There is not a suggestion that the third subdivision was intended to apply to any proceeding of a nature to which the first or second subdivisions were not also applicable. In vain do we search the statute for any words that are appropriate to contempt proceedings. Furthermore, the notable limitations in the first and second subdivisions exclude the idea that contempts could have been within the intent of Congress. The language is: "* * * based upon the invalidity or construction of the statute upon which the indictment is founded." Not merely is there no indictment in contempt proceedings, but such proceedings at the time of the passage of the Act were not

founded upon statute but upon "power inherent in all courts to enforce obedience." (*Meyers* v. *United States,* at p. 103.)

It is evident that the statutes which this law refers to are those Federal Statutes which make some act a crime and an indictable offense. It is only when the statute upon which the indictment is founded, that is, the statute defining the criminal offense which the indictment charges has been committed, is brought into question, that the Government can prosecute error under the first two sections of the Act. The very terms of the first and second paragraphs of the Act show that Congress did not intend to include "criminal contempts" within the term "criminal cases." Informations in Contempt are founded on violations of decrees, judgments or orders of the court. It must follow, therefore, that had Congress intended to include "Criminal Contempt" proceedings in the classification of "criminal cases" it would have further provided in the Act for the writ of error from a decision or judgment based on the validity or construction of a decree, judgment or order. If a motion to quash or a demurrer had been filed on behalf of any defendant in any given case in the Information at bar, requiring a construction of the Decree upon which the charge in the said Information is based, and the lower court had, on construing its decree sustained said motion or demurrer, or had any defendant been convicted and thereafter had the lower court arrested the judgment, basing its decision on the construction of its original decree, in either event no writ of error would lie to this court. This court would be without jurisdiction to hear, and the Government without right to prosecute, such an error proceeding under the Criminal Appeals

Act. There is no essential reason why provision should be made for appeals on the part of the Government where statutes upon which indictments are founded are involved and not for decrees, judgments and orders upon which Informations in Contempt are founded, if Congress meant to include "Contempt Proceedings" within the Act.

We submit that the language of paragraph 3, would require considerable amplification on the part of Congress to include a class of cases (Criminal Contempts) which it had carefully excluded from paragraphs 1 and 2.

Few words need be said with respect to the three cases relied upon by the Government.

Gompers v. *United Sates,* 233 U. S. 604, is clearly not in point. There it was held that the defendant would be given the benefit of the same statute of limitations as was given in criminal cases, this Court arguing that inasmuch as it was against the genius of our laws to have no period of limitations, either the statute could be construed broadly enough to cover contempts or, by analogy, it would be applied to contempts. This Court said: "A rule should be laid down, if not by Congress by this court."

In *Ex parte Grossman,* 267 U. S. 87, this Court held that a proceeding in criminal contempt was "an offense against the United States" within the meaning of Art. II, Sec. 2, Cl. 1 of the Constitution, giving the President power to grant pardons; but this Court also cited with approval the language from *Myers* v. *United States* given above, and pointed out that the term "offenses" as used in that clause of the Constitution is more comprehensive than the words "crimes and criminal prosecutions."

Michaelson v. *United States,* 266 U. S. 42, does not aid the Government, but on the contrary, by implication, aids the defendants. This Court there held that a statute giving the right of jury trial in proceedings for criminal contempts where the act was also a crime, was not violative of the Constitution. From that the Government can draw no comfort. If this Court had meant to hold that a criminal contempt was a criminal case, there would have been no need for a careful opinion as to why the statute was not unconstitutional—the shoe would have been on the other foot, for the Constitutional principle is that in criminal cases there should be a jury trial.

(*b*) THERE HAS BEEN NO DECISION OR JUDGMENT SUSTAINING A SPECIAL PLEA IN BAR WITHIN THE MEANING OF THE CRIMINAL APPEALS ACT

We agree with the Government that it is immaterial what the defendants call their pleading, as the only material question is what the pleading actually is. (*United States* v. *Barber,* 219 U. S. 72; *United States* v. *Storrs,* 272 U. S. 652).

What the defendants did was to file, under the circumstances hereinbefore set forth, a paper which read as follows:

> "Now comes the following defendants and they and each of them respectively move to dismiss the charge or charges set opposite his name below on the ground that it appears on the face of the information that this proceeding for contempt was instituted more than one year after the date of the alleged act or acts complained of in said charges." (R. 45.)

The third subdivision of the Criminal Appeals Act reads: "from the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

This Court has very recently held with reference to this statute:

> "The statute uses the technical words 'a special plea in bar' and we see no reason for not taking them in their technical sense." (*United States* v. *Storrs*, supra.)

The words "special plea in bar" have long since acquired a well-settled meaning in the law. Those pleas appeared first in the civil law and subsequently in the criminal law. The essential and fundamental characteristic of a special plea (whether it be in bar or in abatement) is that it denies the right of the Government to succeed by reason of facts extrinsic to the indictment. As long ago as 1824, Starkie in 1 Criminal Pleadings 349, said:

> "By the plea in bar, the defendant shows, by matter extrinsic to the record, that the indictment is not maintainable."

Bishop adopts this definition in the same language (2 Bishop's New Criminal Procedure, 2d Ed. 1913, p. 583).

Mr. Justice Gray said for this Court in *Farley* v. *Kittson*, 120 U. S. 303, at page 315:

> "The distinction between a demurrer and a plea dates as far back as the time of Lord Bacon, by the 58th of whose Ordinances for the Administration of Justice in Chancery, 'a demurrer is

> properly upon matter defective contained in the bill itself, and no foreign matter; but a plea is of foreign matter to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed or excommunicated, or there is another bill depending for the same cause, or the like.' Orders in Chancery (Beames's ed.) 26. Lord Redesdale, in his Treatise on Pleadings, says: 'A plea must aver facts to which the plaintiff may reply, and not, in the nature of a demurrer, rest on facts in the bill.' Mitford Pl. 297. And Mr. Jeremy, in a note to this passage, commenting on the ordinance of Lord Bacon, observes, 'The prominent distinction between a plea and a demurrer, here noticed, is strictly true, even of that description of plea which is termed negative, for it is the affirmative of the proposition which is stated in the bill'; in other words, a plea, which avers that a certain fact is not as the bill affirms it to be, sets up matter not contained in the bill."

The distinction between demurrers or motions to dismiss, on the one hand, and pleas, on the other, is clear. The former set forth nothing new, but merely raise the issue of law that if everything alleged in the indictment be taken to be true, the Government cannot succeed. The latter, in contrast thereto, set forth one or more extrinsic facts necessary to the defense that the defendant asserts.

The distinction has been clearly recognized by Congress in the Criminal Appeals Act. Subdivisions (1) and (2) deal with the insufficiency of the indictment. Congress has there granted this Court jurisdiction only if the question involved is the construction or constitutionality of the statute upon which the indictment is based. Subdivision (3), on the other hand, deals with

special pleas in bar and contains no such limitation. Congress used technical words, and had clearly in mind the difference between the pleading that raises only the sufficiency of the indictment and the pleading that draws in matters not contained in the indictment.

There can be no doubt as to the category in which the pleading of these defendants falls. It set forth no new fact. It merely moved to dismiss, on what "appears upon the face of the information." It is unquestionably not a special plea.

But, says the Government, the defense of the statute of limitations can only be raised by special plea or under the general issue, and cannot be raised by demurrer. For this it cites *United States* v. *Cook*, 17 Wall. 168. The Government is right in saying that the defense of the statute of limitations may be raised under the plea "not guilty" (*United States* v. *Kissel*, 218 U. S. 601), (R. 39). But the balance of the Government's contention is incorrect.

It is true that the defense of the statute of limitations has usually been raised in pleadings that are properly called "special pleas in bar," rather than by demurrers or by motions to dismiss. That, however, is merely due to an accident rather than to anything inherent in their nature. The statute of limitations customarily pleaded is found in R. S. 1044; and that is restricted by R. S. 1045 so as not to apply to any person fleeing from justice. (Before the Revised Statutes, these two sections constituted but one, viz., Section 32 of the Act of April 10, 1790.) Therefore, whenever a defendant has desired the benefit of that statute of limitations, his pleading, of necessity, had to be a special plea in bar setting up the additional fact not appearing in the

indictment, viz., that the defendant was not a fugitive from justice.

This was well illustrated in *United States* v. *Cook*, (supra) cited by the Government. This court there held that the Statute of Limitations could not there be raised by demurrer because of this very limitation, saying:

> "* * * as such proceeding would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant fled from justice and was within the exception." (p. 179, 180.)

Thus, whenever R. S. 1044 is relied on, a special plea in bar is necessary. Accordingly, when we examine *United States* v. *Barber*, 219 U. S. 72, relied on by the Government as a case in which the statute of limitations was held to be a plea in bar, we find that the defense was under R. S. 1044, and the brief of the defendant in error specifically stated (at page 9):

> "In this case the allegation that the defendants were not fugitive from justice constitutes the new matter."

The Government admits that the language of the earlier cases is in accordance with the rule as we have stated it, that the function of a special plea in bar is to set up new matter. The Government intimates that the rule has perhaps been changed, and states (without the citation of authority) that a plea in bar does not have to set up new matter and that the failure to do so is not essential to its nature. Obviously, this cannot be so, for if it were true, the careful distinction

that Congress has drawn between the first and second subdivisions, on the one hand, and the third subdivision, on the other, would be meaningless. On authority, the statement is wholly without support. As we have pointed out, this Court has but recently held that the words "a special plea in bar" are used in their technical sense (*United States* v. *Storrs,* supra); and we challenge the Government to point to a single holding by this Court to support its contentions. An examination of the authorities shows that wherever the question has been raised in this Court, the distinction has been kept clear. The explanation above given with respect to R. S. 1044 will explain most of the cases to which the Government refers.

Special reference, however, must be made to the three cases referred to in the first foot-note on page 23 of the Government's brief, which is the only place in which the Government expressly attempts to cite authority for its position. *United States* v. *Gompers,* 233 U. S. 604, is clearly not in point, because that was an appeal by the defendant and not by the Government, so that the Criminal Appeals Act and its provisions were not applicable. *United States* v. *Novek,* 271 U. S. 201, is, likewise, not in point. It there appeared that the defendant raised the defense under R. S. 1044. It is true that he failed to allege affirmatively that he was not a fugitive from justice; it is also true that the Government omitted to raise his failure to allege that fact; and the jurisdiction of this Court was conceded by both sides. Only the interpretation of the statute was argued, and the jurisdictional question was not mentioned in the opinion. But if we look past the errors of both sides and seek the substance of the situation, we find that the defendant raised the de-

fense of R. S. 1044, which necessitated a special plea in bar, so that the sustaining thereof did give this Court jurisdiction. When we come to *United States* v. *Rabinowich,* 238 U. S. 78, we have a case (and the only case that diligence of counsel on either side has been able to discover) in which a decision sustaining the defense of the statute of limitations not setting up a new fact, was successfully appealed to this Court; but the fact is that the question of jurisdiction was not raised by the briefs of either party nor by this Court; the opinion of this Court did not refer to the matter, and it is only by a painstaking examination of the record that this hidden fact can be brought to light. But this single exception does not cause us to qualify our statement in any way that this Court has never intentionally held that a pleading could be a special plea in bar where it did not set up a new fact. This Court has never let down the bars, and we submit that, in view of its decisions and of the express language of the Criminal Appeals Act, it cannot do so.

In the case at bar, the statute of limitations relied on is Section 25 of the Clayton Act. It will be noted that this contains no such limitations as are found in R. S. 1044 and 1045; it calls for no such pleading. Accordingly, all the facts necessary for the defense appeared upon the face of the information, and the defendants, therefore, did not have to plead a special plea in bar setting up any additional fact. In reality, if they had attempted to plead a special plea in bar, their pleading would not have been such.

The Government also cited *United States* v. *Cook* (supra), as authority for the proposition that the statute of limitations could not be raised on demurrer.

This has been held in several cases for the reason given by the Court in that case, viz:

> "Also, for the reason that the effect of the demurrer, if sustained, would be to preclude the prosecutor from giving evidence, as he would have the right to do, under the general issue, to show that the offense was committed within two years next before the indictment was found and filed." (p. 180.)

The theory thus advanced is that in the ordinary case the prosecutor is not bound by the date set forth in the indictment, so that the defendant should be left to raise the statute of limitations under the general issue which would give the prosecutor the opportunity of proving that the crime was committed within the period allowed by the statute. But, clearly, when the reason does not exist, the rule should not be applied. (See *United States* v. *Owen*, 32 Fed. 534.)

In our case, the reason for the rule did not apply, and the Government properly refrained from raising the point. Voluminous testimony had been taken before a Special Examiner, which testimony had been returned by the Examiner and was in the Court. Everyone connected with the case knew what the evidence would show as to the dates upon which the alleged acts had been committed. In handling a case of criminal contempt, the Court has considerable latitude:

> "The exact form of the procedure in the prosecution of such contempts is not important." (*Cooke* v. *United States*, 267 U. S. 517, 536.)

And

> "The manner in which the proceeding shall be conducted, so that it is without oppression or unfairness, is a matter of judicial regulation." (*Randall* v. *Brigham*, 7 Wall. 523, 540.)

The defendants had entered a plea of "not guilty"; the facts and dates had been pleaded with great exactitude in the information, and the testimony that had been taken had, as a practical matter, removed the question of variance. The Court very properly, in the exercise of its discretion, took up this issue, and the Government very properly raised no objection thereto. No right of either party was infringed thereby; neither side offered any objection thereto; and a decision was reached expeditiously and without further expense, on a question that finally disposed of substantially the entire litigation. If the prosecutor had raised the point that moved this Court to its decision in *United States* v. *Cook*, 17 Wall. 168, or if this had been a criminal case, subject to stricter rules of procedure than a proceeding in contempt, we might have been confronted with a different situation. But neither of those conditions existed.

Moreover, the correctness of the decision of the Court in considering and deciding the applicability of the statute of limitations in this form, is not before this Court for decision. Unless there has been a decision sustaining a special plea in bar, this Court is without jurisdiction; and if the defendant's pleading was a motion to dismiss or a demurrer, then, even if the Court below was in error in entertaining it and deciding it, we respectfully urge that it would be an error that this Court could not correct. From such an error,

the Government cannot take a writ under the Criminal Appeals Act.

There is left to us merely to take up what we understand is the substance of the Government's argument, namely, that if the instrument filed by the defendants is not a special plea in bar, what is it. That question is wholly beside the point. The only question before this Court is whether the defendants have interposed a special plea in bar. Clearly, they did not do so; and as they did not do so, no writ of error lay on the part of the Government to review the judgment, and this Court is without jurisdiction. Although we do not believe it is necessary for us to answer the Government's question, still, for our own part, we contend that the defendants' pleading was exactly what it purported to be, viz., a motion to dismiss the information, for a good and sufficient reason in law appearing upon the face thereof. We believe and contend that the motion was properly entertained and properly decided; but even if it were improperly entertained, the error is not one that the Government can review under the Criminal Appeals Act.

Finally, we must call attention to the paper that was filed by the Government. It was called "a demurrer to a special plea in bar," in an attempt to bring the case within the Criminal Appeals Act. Names are, of course, inconsequential. If the defendants' pleading were truly a special plea in bar, a demurrer to it could have been interposed. But the test of the defendants' pleading, in the light of the Government's demurrer, is perhaps the concluding argument that it was not a special plea. There was nothing that this demurrer could possibly cover. A demurrer admits the facts alleged in the pleading to which it is directed,

and denies their sufficiency in point of law. The Government could not claim that any new matter alleged by the defendants as a defense did not, in law, constitute a defense. There is not a fact alleged in the defendants' pleading. The impossibility of the Government demurring to the defendants' pleading is the final proof that it was not a special plea.

(*c*) THE DEFENDANTS HAVE BEEN PUT IN JEOPARDY

The Government might have taken the position that the defendant never is in jeopardy in a legal sense in a criminal contempt proceeding; and there is authority in the State Courts to that effect, based upon the proposition that proceedings in contempt are only quasi-criminal and that the Constitutional provisions respecting former jeopardy are not applicable. (See *Jones* v. *Mould*, 151 Iowa 599; *Brown* v. *Farley*, 38 N. J. Eq. 186.) Had the Government taken that position, it would have furnished an additional reason for our contention under Point A that this proceeding in criminal contempt was not a criminal case, within the Criminal Appeals Act, especially within the view of the language of the third subdivision.

The Government, however, in its brief has not taken that position, but apparently admits that jeopardy can arise in a proceeding for criminal contempt. The question then presented is whether in the instant case the defendants were put in jeopardy.

In determining just when a defendant has been "put in jeopardy" the decisions of the courts in ordinary criminal cases where a jury is required are of very little assistance except to establish the rule that a de-

fendant has been put in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him. Usually it has been held that this point is not reached until the jury is sworn. However, the protection against double jeopardy is applicable in tribunals organized without a jury. In the case of *Kepner* v. *United State,* 195 U. S. 100, this court says (p. 128):

> "It is true that some of the definitions given by the text-book writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him, certainly so after acquittal. *Coleman* v. *Tennessee,* 97 U. S. 509. Undoubtedly in those jurisdictions where a trial of one accused of crime can only be to a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But, protection being against a second trial for the same offense, it is obvious that where one has been tried before a competent tribunal having jurisdiction he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit. *People* v. *Miner,* 144 Illinois 308; *State* v. *Bowen,* 45 Minnesota 145; *State* v. *Layne,* 96 Tennessee 668."

In *Grafton* v. *United States,* 206 U. .S 333, the defendant had been tried before a general court-martial under the Articles of War and had been acquitted. He was afterwards prosecuted by the civil officers un-

der the Philippine Penal Code. We quote the following from page 352:

> "If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States. A different interpretation finds no sanction in the Articles of War; for the 102d Article of War (which is the same as Article 87, adopted in 1806, 3 Stat. 369) declares that 'no person'—referring, we take it, to persons in the Army—'shall be tried a second time for the same offense.' But we rest our decision of this question upon the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government. Congress has chosen, in its discretion, to confer upon general courts-martial authority to try an officer or soldier for any crime, not capital, committed by him in the territory in which he is serving. When that was done the judgment of such military court was placed upon the same level as the judgments of other tribunals when the inquiry arises whether an accused was, in virtue of that judgment, put in jeopardy of life or limb. Any possible conflict in these matters, between civil and military courts, can be obviated either by withholding from courts-martial all authority to try officers or soldiers from crimes prescribed by the civil power, leaving the civil tribunals to try such offenses, or by investing courts-martial with exclusive jurisdiction to try such officers and soldiers for all crimes, not capital."

And also the following from page 355:

> "But passing by all other questions discussed by counsel or which might arise on the record, and restricting our decision to the above question of double jeopardy, we adjudge that, consistently with the above act of 1902 and for the reasons stated, the plaintiff in error, a soldier in the Army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippines, by a military court of competent jurisdiction, proceeding under the authority of the United States, could not be subsequently tried for the same offense in a civil court exercising authority in that Territory."

In our brief and in the Government's brief there appear references to the various proceedings had before the District Court up to the time of the entry of the judgment of dismissal. These, of course, are also disclosed in the record. The information was filed on November 2, 1925; defendants pleaded "not guilty" on February 15, 1926; on March 1, 1926 the Court appointed the Examiner to take testimony; during the next year over 3000 pages of testimony were taken, and in May 1927 the taking thereof before the Special Examiner was terminated. The case was then in the position that the Government could pass upon the merits of its case against the various defendants, and it dismissed about 80 percent. of the charges. With respect to the remainder, the Court was fully advised that one of the issues that was raised by the plea of "not guilty" and that the Court would have to try, was the issue of the statute of limitations. The Court, in the exercise of the full discretion granted to it, took up the trial of this issue prior to the trial of the remaining issues in the case. The issue so tried was a substantive issue that went to the merits; there was

every reason, from the standpoint of economy of time and money, why that issue should have been first tried; and it is noteworthy that neither side objected to the court so proceeding. The judgment of the Court was a decision in favor of the defendants on this substantive issue that went to the merits. In its decision on the motion, the District Court says (R. 54):

> "The demurrer being overruled and in our opinion the Special Plea in Bar stating a good defense of the running of the Statute of Limitations, it follows that the several charges which show upon their face that such statute has run, must be dismissed and an order may be drawn accordingly."

In *United States* v. *Oppenheimer, et al.*, 242 U. S. 85, the Court held that a plea of the statute of limitations is a plea to the merits and a judgment for defendant that the prosecution is barred by limitation of time goes to his liability in substantive law; and in whatever form the issue was raised, such a judgment may be interposed as a conclusive bar to another prosecution for the same offense.

In the instant cases the defendants were before the court on their plea of "not guilty" to an Information filed by the Government. They were (if these are criminal cases) "regularly charged with a crime" and at any event whether charged with "crime" or not, they were "before a tribunal properly organized and competent to try them" on November 4, 1927. There were no further steps to be taken to perfect the organization of the tribunal which was to hear and pass on the charges. The hearing was held before the *only* tribunal that could hear the charges against them.

Merchants, etc. Co. v. *Board of Trade*, 201 Fed. 20, 27.
Myers v. *United States*, 264 U. S. 95.

It was "a competent tribunal having jurisdiction" (*Kepner* v. *United States,* supra) and after hearing a substantive defense going to the merits of their cases, that tribunal dismissed them for the reason that applying the law to the admitted facts, defendants were entitled to an acquittal. The form in which this issue was raised is immaterial.

United States v. *Oppenheimer,* 242 U. S. 85, 88.

To summarize, we submit therefore:

That even if Contempt Proceedings are "Criminal Cases" within the meaning of the Criminal Appeals Act, and even if the motion to dismiss, filed in the instant cases should be held to be "A Special Plea in Bar" nevertheless the third subdivision of said act does not apply for the reason that these defendants-in-error were "put in jeopardy" and therefore this court is without jurisdiction to review the instant cases on error.

II

THESE PROCEEDINGS ARE BARRED BY LIMITATION OF TIME

Defendants claim, and the court below decided (opinion R. 46) that these proceedings are barred by virtue of Section 25 of the Clayton Act (38 Stat. 730) which we have printed as Appendix A to this brief.

1. Section 25 is clear and comprehensive, leaves no room for construction and does not require a resort to judicial interpretation

There is no ambiguity in the language used in this section on the subject of the limitation of time within which any proceeding for contempt may be instituted against any person. Congress could not have used any plainer or more comprehensive words to express its

intent. The language is "that no proceeding for contempt shall be instituted." There is nothing here calling for construction, for the words mean exactly what they say, and any argument or amplification is superfluous. Nothing is obscure and therefore there is no need of interpretation.

As this court said in *Michaelson* v. *U. S.*, 266 U. S. 42, on page 68, in connection with the language of another section of the Clayton Act, "the words of the act are plain and in terms inclusive of all classes of employment, and we find nothing in them which requires a resort to judicial construction." The same statement may be accurately made in connection with the language of Section 25 and the classes of contempt referred to, for the words are plain and inclusive of all classes of contempt. In *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, this court refused to place any limitation on the broad language calling for construction in that case (page 38).

In Section 24 the Act refers to certain classes of contempt, including all cases of contempt not embraced in Section 21. These classes cover practically all contempts, and the reason for mentioning them was to exempt them from the procedure and punishment provided in Sections 21 to 23, and to provide for their punishment in conformity to the usages at law and in equity then prevailing, meaning, without a trial by jury. With these classes in mind, Section 25, which follows Section 24, and introduces a new subject, uses the most comprehensive terms to include every contempt proceeding, embracing those just mentioned for special reasons in Section 24. The contrast is impressive and the intent clear. To endeavor to make this plainer would be like an effort to reason upon a sum in simple addition. *Slingluff* v. *Weaver*, 66 O. S. 621.

2. An analysis of the act supports defendants' contention

The ambiguity claimed by the Government results from the opening words of Section 24. That section provides "that nothing herein contained shall be construed" to relate to certain contempts thereafter referred to.

Both parties admit that these words are of limited scope. The difference between them is the extent of the limitation. The Government claims that the words are applicable to Sections 21 to 25, inclusive. The defendants claim that the words are applicable to Sections 21 to 23, inclusive. The difference between the parties is that the Government undertakes to include Section 25 within the meaning of the phrase "nothing herein contained," whereas the defendants exclude Section 25. Neither party applies these words to the entire Act or to Section 24 only.

The Clayton Act by its title and contents admittedly includes several purposes, and covers a number of subjects more or less unrelated. This point is nowhere better stated than in *Sandefur* v. *Canoe Creek Coal Company*, 293 Fed. 379, at page 380 as follows:

> "The Act, considered as a whole, covers several more or less distinct subjects. It is entitled 'An Act to Supplement Existing Laws against Unlawful Restraints and Monopolies, and for other Purposes.' The first eight sections pertain directly to the subject of Trusts and Monopolies (Compt. St., Secs. 8835-A—8835-H); Section 9 (Compt. St., Sec. 8602, concerns Interstate Commerce; Section 10 (Compt. St., Secs. 8835-1), Combinations among Common Carriers; Section 11 (Compt. St., Sec. 8835-J), Proceedings to Enforce Certain Provisions of the Act; Sections 12-16 (Compt. St., Secs. 8835-K—8835-O), Anti-trust Procedure and

Remedy; Sections 17-19 (Compt. St., Secs. 1243-A—1243-C), Regulations of Injunction and Restraining Orders in all Cases; Section 20 (Compt. St., Sec. 1243-D), Limits the Power of an Equity Court to issue any injunction in a certain class of cases, viz: between employer and employee; and Sections 21-24 (Compt. St., Secs. 1245-A—1245-D), pertain to procedure in any District Court punishing contemptuous disregard of any order of such Court, providing the act constituting the contempt is also a criminal offense."

At various places in the Act words are used that are designed to limit the text to the particular subject-matter then under consideration. For examples, see the language of the two provisos in Section 2, of paragraph 4 in Section 7, of Section 16, Section 22 and the last sentence of Section 25. This was necessary in an act containing so many distinct and separate subjects, even though related in some of their aspects.

It becomes important, therefore, to consider the subject-matter to which Section 24 was intended to apply. We contend that it is the matter of procedure and punishment of contempts covered by Sections 21 to 23, inclusive. Section 21 refers to a specific kind of contempt and provides for the procedure as thereafter stated. Section 22 sets forth with some particularity the procedure to be followed, and Section 23 provides the method of review and for admission to bail. The most significant feature of the procedure, and the one which commanded the attention of Congress particularly, was the provision for a jury trial. This was novel and questionable, and required caution in its enactment. A limited class of contempts was selected for the experiment. It is quite evident that the only purpose of Section 24 was to exempt the classes of contempt

therein stated (including all contempts not specifically embraced in Section 21) from the procedure and punishment of the contempts referred to in Sections 21 to 23, inclusive, particularly from trial by a jury.

The subject-matter of Sections 21 to 23 ended with Section 24, which is in the nature of a proviso and could have begun with the word "provided." That it does not is immaterial for such is its clear purpose and intent, and it is a well-settled principle that a proviso refers to matter preceding it and has no reference to that which follows.

Section 25 then takes up a new subject-matter entirely independent of what precedes it, although related in general aspects. Both subjects have to do with contempts it is true, but each is separate and distinct in purpose and content.

A somewhat analogous situation was considered by this court in *U. S.* v. *Fisher*, 2 Cranch 358. The court there called attention to the fact that certain sections of the Act were connected and plainly contained provisions on the same subject, whereas the next section was unconnected with those preceding it and was not limited by them. (See pages 389 and 390.) Such is the case here.

The position of Section 25 in the Act is significant and not without purpose. If Congress had intended that it should be limited by the provisions of Section 24, the two sections would have been reversed.

When all of these matters are considered, in connection with the clear and comprehensive character of the language used in Section 25, we submit that the court below was right and its opinion should be approved by this court.

3. The history and purposes of the Act support the construction of the defendants

Contrary to the claim of the Government, the history and purposes of the Act are more in harmony with the construction claimed by the defendants than the one asserted by the Government.

Mr. Clayton introduced two bills in the Sixty-second Congress, second session (1912), which were commonly known as "The Clayton Injunction Bill" and "The Clayton Contempt Bill." The latter was introduced on March 29, 1912 and became H. R. 22591. It provided for five additional sections to the Judicial Code to be known as 268-a to 268-e, inclusive. The Bill passed the House, but failed of passage in the Senate during the Sixty-second Congress. These sections, in substantially the same form, became Sections 21 to 25, inclusive, of the Clayton Act, as passed by the Sixty-third Congress in 1914.

The original contempt bill (H. R. 22591) was referred to the Committee on the Judiciary of the House. The Government cites (brief 35 and 36) two paragraphs of the committee report, but omitted a third paragraph. The full statement of the committee was as follows:

> "Section 268-D excepts from the operation of the Act contempts in the presence of the court, or so near thereto as to obstruct the administration of justice, and contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of the United States, and provides that in the excepted cases as well as in all other cases not specifically embraced within section 268a, the punishment shall be in conformity to the usages at law and in equity now prevailing.

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(H. R. No. 613, part 2, Si
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Section 5, or 268-E, makes the Statute of Limitations in SUCH CASES, and in *ALL CONTEMPT CASES, ONE YEAR* from the act complained of, nor shall any such proceeding bar the criminal prosecution for the same act or acts. Nothing in this Act shall affect any proceedings for contempt pending at the time of the passage of this Act."

(Congressional Record, Volume 48, part 9, page 8803.)

(Emphasis our own.)

We submit that Mr. Webb was correct in this statement that the section referred to made the Statute of Limitations applicable in all contempt cases. There would seem to be no doubt, therefore, that when in the succeeding Congress Mr. Webb made the statement quoted in the Government's brief (page 34), he was referring, as did the committee in its report on the earlier Bill, solely to so much of the Bill as granted and applied to the right of trial by jury.

In Report No. 613, accompanying the 1912 Contempt Bill, the committee states that the feature of the Bill against which the most strenuous argument had been directed was the provision for trials by jury. The following statement in reference to the purposes of the Bill is made by the committee:

"The bill is an evolution from prolonged and varied discussion, by no means limited to a recent date or to the present Congress. Every feature and provision of it has been subjected to attack and defense, but the whole controversy appears to have at length converged upon the issue of whether or not the policy and practice of jury trial in con-

tempt cases shall be admitted in the Federal jurisprudence at all.

That complaints have been made and irritation has arisen out of the trial of persons charged with contempt in the Federal courts is a matter of general and common knowledge. The charge most commonly made is that the courts, under the equity power, have invaded the criminal domain, and under the guise of trials for contempt have really convicted persons of substantive crimes for which, if indicted, they would have had a constitutional right to be tried by jury. It has been the purpose of your committee in this Bill to meet this complaint, believing it to be a sound public policy so to adjust the processes of the courts as to disarm any legitimate criticism; and your committee confidently believes that, so far from weakening the power and effectiveness of Federal courts, this bill will remove a cause of just complaint and promote that popular affection and respect which is in the last resolve the true support of every form of governmental activity."

The history about the limitation provision is as follows:

Shortly prior to the time that Mr. Clayton introduced his Bill in the Sixty-second Congress, this court decided *Gompers* v. *Buck Stove & Range Co.,* 221 U. S. 418. At that time there was no Statute of Limitations in reference to contempt proceedings and Mr. Clayton in his Bill undertook to supply that deficiency.

Gompers v. *U. S.,* 233 U. S. 604, was decided by this court on May 11, 1914, and by analogy this court fixed the limitation for three years, calling attention to the fact that some time limit should be placed on contempt proceedings either by Congress or the court. At that time the Clayton Act was before Congress and was finally passed on October 15, 1914, with Section 25

clearly providing that no proceeding for contempt should be instituted against any person unless begun within one year from the date of the act complained of. It was undoubtedly the purpose of Congress to supply an omission referred to by this court and we submit that it was efficiently done by the enactment of Section 25.

4. The Government's contention is unreasonable and leads to results that could not have been intended by Congress

The contention of the Government is that by reason of the provisions of Section 24, Section 25 does not apply to

(a) Contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice.

(b) Contempts committed in disobedience of a decree in a suit brought by the United States.

(c) Any type of contempt not specifically embraced within Section 21.

It is claimed that the type embraced within Section 21 is of narrow scope and the contemptuous act must constitute a criminal offense under state or Federal law and must be something done as distinguished from an omission to act.

Under this construction Section 25 covers only contempt cases arising from the violation of an order entered in litigation between private parties when the act of contempt constitutes a crime. In all other cases, according to the Government's contention the limitation of time is three years. This includes not only contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice but every other kind of contempt.

In other words Sections 21 to 25 inclusive cover only a very small and limited class of contempts and the mass of contempts are exempted from all the provisions of the Act, including the time limit within which they may be instituted. This small but heinous class (because also criminal) is favored with a one-year statute of limitations, while all other classes of contempt may be prosecuted at any time within three years. This is certainly a most anomalous situation and excites suspicion as to whether it conforms to the intent of Congress.

It is to be observed that no sufficient reason appears for the one year limitation when the contemptuous act is a crime and a three year limitation when it is not a crime. Reason and common sense would suggest the opposite. If a contempt is committed in the presence of the court a one year limitation is much more reasonable than a three year limitation, yet under the Government's claim such a contempt could be prosecuted at any time within three years and so with all other contempts except those embraced within Section 21.

This contention presupposes that Congress proposed to establish a one-year limitation for the contempts covered by Section 21, unless the order disobeyed was entered in a suit brought by the United States. In all other cases the three-year limitation established by this court was to prevail. If this be correct, why didn't Congress say so? The object to be accomplished according to this theory was simple and plain. Why should Congress resort to circumlocution?

If Congress had intended this result in the passage of the Clayton Act it is very strange that it took such a peculiar way to accomplish that purpose. We maintain that if it had been so intended appropriate and

direct language would have been used. As it is, the language of Section 25 is broad and comprehensive and the result above stated is only reached by limiting that section in view of the language of Section 24. We maintain this is unreasonable, and directly contrary to Congressional intent.

Why should Congress legislate at all on the subject of the limitation of time after this court had adopted the three-year rule? Certainly for no other reason than to change that rule, or to confirm its universality. According to the Government, it did neither, but selected a small class of contempts, and without any reason, in fact unreasonably, established a one-year period for that class, leaving all others under the rule adopted by this court, and all this it did indirectly and circuitously. Such methods should not be imputed to Congress.

We submit such results are nothing short of absurd and should not be countenanced by this court.

5. *The new United States Code is neither authoritative nor helpful on the point involved*

The Code of Laws of the United States of America in force December 6, 1925, is found in 44 Statutes, part 1. The enacting clause is found on page 1. It provides that the matters set forth in the Code shall establish *prima facie* the laws of the United States in force December 7, 1925, but nothing in the Act shall be construed as repealing or amending any law or as enacting any new law. In case of any inconsistency arising through omission or otherwise between the provisions of any section of the Code and the corresponding portion of legislation, effect shall be given for all purposes whatsoever to such enactments.

We do not understand that the Government claims anything more than that the language of the Code states

the opinion of the revisors (not necessarily Congress) upon the meaning of existing law without adding any new law or changing the old. The Government inferentially admits that Congress is not entirely responsible for the arrangement of the Code. It may be that the Department of Justice itself contributed a share in the work. It would be a very unsafe rule for this court to establish that the opinion of the revisors, even though they be in the Department of Justice, is of any particular value to this court in the construction of an Act such as the Clayton Act. The opinion of the court below in this case, is much more valuable.

Congress evidently intended that the courts should go to the original Act and determine the intent of the legislators from the language used in such Act.

The committee on the revision of the laws recognized the possibility of error in the Code as presented. Scrutiny and criticism were invited by the committee. (See Preface to the Code.) They need it in this particular instance.

This court can not base its opinion upon such an uncertain authority as the unnamed revisors and codifiers whose services were availed of by Congress.

CONCLUSION

In view of all of the foregoing, it is therefore respectfully submitted:

(1) That for the reasons set forth herein, this court is without jurisdiction to review the instant cases on error.

(2) That the time limitation to be applied to all charges in the instant cases is one year, and not three years, as claimed by the Government.

(3) That the charges against the respective defendants herein fall within the category defined by this court in the Gompers case (233 U. S. 604, 610) to-wit: that each "is a charge of specific acts . . . and therefore each must be judged by itself" and consequently the District Court was right in dismissing the charges in each instance where the same was done, and its judgment, therefore, should be affirmed.

Respectfully submitted,

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NEVIN & KALBFUS,
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DINSMORE, SHOHL & SAWYER,
Of Counsel.

APPENDIX A

[THE CLAYTON ACT.]

[PUBLIC—NO. 212—63D CONGRESS.]

[H. R. 15657.]

(An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided,* That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly

to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 5. That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provide*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

SEC. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition betwen the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor

to exempt any person from the penal provisions thereof or the civil remedies therein provided.

SEC. 8. That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than $5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than $5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer, or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer, or employee has been elected or selected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place: *Provided*, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further*, That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further*, That nothing contained in this section shall forbid a director of class A of a Federal reserve bank,

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less than one year nor more than ten years, or both, in the discretion of the court.

Prosecutions hereunder may be in the district court of the United States for the district wherein the offense may have been committed.

That nothing in this section shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

SEC. 10. That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses

of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section it shall be fined not exceeding $25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

SEC. 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an

order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The

judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

SEC. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial

district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

SEC. 13. That in any suit, action, or proceeding brought by or on behalf of the United States subpœnas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district: *Provided*, That in civil cases no writ of subpœna shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

SEC. 14. That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

SEC. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held

or not, and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

SEC. 17. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when

the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

Nothing in this section contained shall be deemed to alter, repeal, or amend section two hundred and sixty-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

SEC. 18. That, except as otherwise provided in section 16 of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

SEC. 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SEC. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons, employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no ade-

quate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any part to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

SEC. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness

to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however,* That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months: *Provided,* That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the con-

tempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

SEC. 23. That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia.

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

SEC. 25. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

SEC. 26. If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Approved October 15, 1914.

APPENDIX B

[SENATE RECORD, VOL. 41, PART 3, PAGES 2190 ET SEQ.]

February 4, 1907. Senator Nelson in charge of the bill. Bill reported from Judiciary Committee with amendment.

> "That a writ of error may be taken by and on behalf of the United States from the district or circuit courts to the Supreme Court or the circuit courts of appeals, as prescribed in an act entitled 'An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March 3, 1891, and the acts amendatory thereof, in all criminal cases, in the following instances, to-wit:
>
> From the decision or judgment quashing or setting aside an indictment:
>
> From the decision or judgment sustaining a demurrer to an indictment or any count thereof:
>
> From the decision arresting a judgment of conviction for insufficiency of the indictment:
>
> From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.
>
> In all these instances the United States shall be entitled to a bill of exceptions as in civil cases.
>
> That hereafter all objections to the sufficiency of the indictment in matters of form only shall be made and determined prior to the impaneling of the jury."

Senator Bacon—This measure in no manner prejudices the rights of the defendant. It in no manner puts him twice in jeopardy. It is a sound principle, one based upon the highest considerations of justice and humanity, that a man shall not be put in jeopardy more than once. In other words, whenever a case has proceeded to the point where the machinery has been put in operation which at its conclusion would result either in a conviction or an acquittal the proceeding must go to its conclusion, and that conclusion must be final, and if before reaching the ordinary stage of finality the case breaks

down the defendant goes free. That is the soundest of principles, one recognized universally in all of the countries at least drawing their legal institutions from the same source that we do.

The sole purpose of this bill is to enact a law by which an erroneous decision by a judge may be corrected without in any manner infringing upon the rights of the defendant.

Senator Mallory—I should like to call the Senator's attention to the provision regarding overruling or sustaining a special plea in bar in the following language:

> "From the decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy."

Senator Bacon—That language was inserted in the bill just out of abundance of caution.

In the first place, if there has been a decision of such a plea relating to a matter of law where the party has not been put in jeopardy, there ought to be an opportunity to have that question decided by the ultimate court. On the other hand, if it is a plea where he has been put in jeopardy, the desire to have that question decided shall not prevail, and the man must go free.

Senator Bacon—In the case where a man is indicted, and he is brought before the court and a demurrer is interposed before he is arraigned, upon the ground that the law under which he is charged with the commission of crime was unconstitutional, utterly null, and void, the judge sustains that demurrer and discharges the prisoner. Now, if that affected only that one prisoner, it would be a matter of comparatively slight importance; but it not only affects that prisoner, not only affects the accused in that particular case, but it affects all other persons who may assume to violate the same law; and a law of Congress is set aside, made absolutely null and void and inoperative by the decision of one judge, without the opportunity for the nine judges who sit in the Supreme Court to pass upon the great question.

Senator Bacon—quoting *Morgan* v. *State*, 13 Ind. 215:

> "Where a valid indictment has been returned by a competent grand jury to a court having jurisdiction, the defendant has been arraigned and pleaded, a jury has been impaneled,

> sworn and charged with the case, and all the preliminary things of record are ready for the trial, the jeopardy has attached; and, unless the defendant waives his constitutional right, or unforseen circumstances withdraw from him the benefit of the privilege, any subsequent lapse or error in the proceedings of the court will entitle him to be discharged from custody."

There is a very clear statement of the preliminary proceedings which, when proceeded with or gone into, will entitle the party to an acquittal and protect him against any future prosecution. But the particular feature to which I desire to call the attention of the Senator from Maine and other Senators who are unfavorable to the consideration or the passage of this bill is this: That with that clear statement of these preliminary proceedings, an examination of this bill will show that there is no question which in any manner relates to any of the particular proceedings enumerated and specified there which under this bill could be carried to the Supreme Court—in other words, every question which can be taken under this bill to the Supreme Court is a question which arises before any single one of the things mentioned in this very clear description of what constitutes jeopardy.

February 12, 1907. Senator Rayner of Maryland offers this amendment:

> "Provided, that if upon appeal or writ of error it shall be found that there was error in the rulings of the court during the trial a verdict in favor of the defendant shall not be set aside."

Senator Rayner—There is no necessity in the world for having a jury before a man can be put in jeopardy; none whatever. A man can be tried before the court and be put in jeopardy. In my state, for instance, the defendant can select his method of trial. He can be tried before the court, and the state has no choice in the matter. He is in jeopardy. But the authorities have gone way beyond that. A man can be put in jeopardy by being tried before a magistrate. The leading case at common law on this subject was decided by Blackburn and Lush. In that case a prisoner was tried before a

magistrate, not on preliminary hearing, but on the merits. He was acquitted, and he was indicted and tried again by the Court of King's Bench. The court unanimously held that he had been put in jeopardy, and that was the end of it. Citing *Wemyss* v. *Hopkins*, (Law Reports 10, Queen's Bench 378).

Senator Knox of Pennsylvania—Jeopardy is not considered as attaching, although the jury has been sworn, if the defendant is erroneously convicted and obtains a reversal of judgment. (*Lovett* v. *State*, 14 South. 837, 838, 33 Fla. 389; *People* v. *Travers*, 19 Pac. 268, 77 Cal. 176.)

By "jeopardy," within the meaning of the Constitution, is meant lawful jeopardy from the commencement of the proceedings until their termination by a proper judgment and sentence or acquittal, or what the law regards as such. Where, either for want of jurisdiction or from some defect in the indictment, or from such error in the course of the proceedings, the verdict is set aside or the judgment arrested on a writ of error brought by the defendant or on a motion made by him, and he is tried again, he is not thereby put in jeopardy a second time. * * *

This bill allows to Government an appeal only from—

> Defendant's motion to quash or set aside indictment;
> Defendant's demurrer to indictment;
> Defendant's motion, successfully made, in arrest of judgment for insufficiency of the indictment;
> A judgment sustaining defendant's special plea in bar.

These proceedings are all defendant's acts before a verdict to prevent a trial, except the motion in arrest of judgment, which is defendant's act after a verdict against him to defeat a judgment on the verdict. These motions of defendant rest upon the want of jurisdiction of the court, the unconstitutionality of the statute, or some other lack of right to proceed to trial or to judgment on the verdict, the effect of all of which is to defeat the jeopardy. Mark this: It is not proposed to give the Government any appeal under any circumstances when the defendant is acquitted for any error whatever committed by the court.

We can not give the Government an appeal or writ of error in any case where a judgment of reversal would put the defendant again in jeopardy, and this bill does not undertake to do so. It gives the

Government an appeal only when the defendant has been successful in defeating his jeopardy by defeating the trial. * * *

Senator Heyburn of Idaho—As to the fourth ground contained in the bill, there we have provided, and expressly provided, that where the defendant has been in jeopardy he can not be tried over again.

> "From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

So in that matter, out of extreme caution and to put it exactly in harmony and in line with the provisions of the three preceding paragraphs, we have expressly provided that where the defendant has been put in jeopardy he can not be reindicted.

The Supreme Court of the United States has covered this ground pretty well in two or three important cases. Take the case of *United States* v. *Ball,* 163 U. S. 671, a case where three defendants were indicted for murder committed in the Indian Territory. They were indicted and tried in the district of Texas, to which the Indian Territory was attached for judicial purposes. On the first trial one of the defendants was acquitted, and two of them were found guilty. The defendants who were found guilty moved an arrest of judgment on the ground, among others, that the indictment was too insufficient; that it did not properly charge a criminal offense. The case was taken to the Supreme Court of the United States, and in 141 United States the court ordered the indictment, in its final decision, to be quashed and directed that the case be proceeded with further in the court below. The three defendants were afterwards reindicted. They were again tried, all three of them, as well as the man who had been acquitted on the first and bad indictment as the two had been found guilty.

When that case came to the Supreme Court of the United States, the Supreme Court held that the first indictment was bad and did not properly charge a criminal offense, and yet the one defendant who had been acquitted on that indictment could not be tried over again, he having been in jeopardy; but as to the other two defendants, they having moved an arrest of judgment and got the trial and proceedings reversed on their own motion, they were liable to be reindicted and retried, and they were properly convicted. * * *

Senator Hale of Maine—I do not regret, Mr. President, calling the attention of the Senate, when the bill was first reported, to what

I believed was the dangerous feature and tendency embodied in the bill.

There never has been much real grievance nor much real wrong from adhering very strictly to the old propositions with regard to criminal trials. The advantage in all such proceedings is with the Government. It has unlimited power and unlimited disposition of moneys in order to maintain its proposition, and it arrays the whole force of a great Government against the single, struggling accused. It is much better, Mr. President, that instead of yielding to the tendency, which is quite uppermost today, of conferring more and more power and more and more privileges upon the Government as against the citizen—it is much better to stand upon the ancient ways.

The present bill has been greatly improved. Without criticising the Committee on the Judiciary, to which we look as the conservative organ of this body, to be wary and slow in innovations where the right of the citizen is concerned, I hope hereafter the Committee on the Judiciary will take notice that it should maintain what, in view of the whole Senate, I believe it has heretofore—its attitude as a conservative body that stands against all encroachments.

As I have said, the bill has been greatly improved. It is surprising that as originally reported to this body it gave, after the old fashion of the legislature and legal procedure of England in the time of the Stuarts, the opportunity for oppressing and wearing out the accused by the instrumentalities which the Government invoked in its management and control of legal procedure. All that, through the opposition to the original bill, has been swept away.

I think the right of the accused to release upon his own recognizance, the provision for expediting the trial, and for relieving him from the worry and strain in which he must always be worn out by the Government is a very great improvement in the bill. For one, I accept it as having been greatly bettered by the discussion and the amendments which have been adopted; but I am not able, Mr. President, even as it is now, to vote for the bill, though I shall make no further demurrer or protestation.

(17)

SUPREME COURT OF THE UNITED STATES.

No. 723.—October Term, 1927.

The United States of America, Plaintiff in Error, *vs.* Jacob A. Goldman, Louis J. Desmare, Clem Miner, et al.	In Error to the District Court of the United States for the Southern District of Ohio.

[May 14, 1928.]

Mr. Justice Sanford delivered the opinion of the Court.

An information presented by the United States to the District Court charged Jacob A. Goldman and others with criminal contempts committed by violating an injunction that had been granted by the court in a suit in equity brought by the United States against the National Cash Register Co. and others to enforce the Sherman Anti-Trust Act. On motion of the defendants in error the information was dismissed as to them on the ground that under § 25 of the Clayton Act[1] the prosecution was barred by the statute of limitations of one year. The United States sued out this direct writ of error under the Criminal Appeals Act.[2]

The questions here are: 1st, whether this Court has jurisdiction under the writ of error; and 2nd, if so, whether the one year statute of limitations is applicable.

The information showed upon its face that the alleged contempts were committed by the defendants in error more than one year, but less than three years, prior to its presentment. They entered pleas of not guilty. In anticipation of and preparation for the trial a special examiner was appointed to take, transcribe and report to the court such testimony as the parties might offer, with the provision and understanding that at the trial the parties might rely on such portion of this testimony as might be desired

[1] 38 Stat. 730, c. 323; U. S. C., Tit. 28, § 390.
[2] 34 Stat. 1246, c. 2564; U. S. C., Tit. 18, § 682.

and also introduce additional testimony, either oral or documentary. The testimony taken by the examiner was lodged with the District Judge, and, in accordance with a *nunc pro tunc* order, endorsed as "Filed with the court pending trial in open court." Before the trial the defendants in error[3] moved to dismiss the charges against them on the ground that it appeared on the face of the information that the proceeding for contempt was instituted more than one year after the date of the alleged acts complained of. The United States demurred to this motion on the ground that, treating it as a special plea in bar, the matters therein contained were not sufficient in law to bar the prosecution of the information. The court, likewise treating the motion to dismiss as a special plea in bar raising the question of the statute of limitations, overruled the demurrer and dismissed the information as to the defendants in error on the ground that the prosecution was barred by the statute of limitations.

1. The Criminal Appeals Act provides that a writ of error may be taken by the United States from the district courts direct to this Court "in all criminal cases, in the following instances, to-wit: . . From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." The defendants in error challenge our jurisdiction under the present writ of error upon the grounds that this is not a criminal case, that the judgment was not one sustaining a special plea in bar, and that they had been put in jeopardy. We cannot sustain this contention.

While a proceeding instituted by the United States for the punishment of a criminal contempt committed by a violation of an injunction is not "a criminal prosecution" within the provisions of the Sixth Amendment relating to venue in a jury trial, *Myers* v. *United States*, 264 U. S. 95, 105, such a criminal contempt is "an offense against the United States" whose prosecution is subject to the statute of limitations applicable to such offenses, *Gompers* v. *United States*, 233 U. S. 604, 611, and which, as such an offense, may be pardoned by the President under Article II of the Constitution, *Ex parte Grossman*, 267 U. S. 87, 115. The only substantial difference between such a proceeding for criminal contempt and a criminal prosecution is that in the one the act com-

[3]The United States had previously agreed to dismiss the contempt proceeding against all the other defendants except one.

plained of is the violation of a decree and in the other the violation of a law. *Michaelson* v. *United States,* 266 U. S. 42, 67. In *Gompers* v. *United States, supra,* 610, this Court said, in language which was quoted with approval in *Ex parte Grossman, supra,* 116: "It is urged . . that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury &c. to persons charged with such crimes. . . It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure . . , and that at least in England it seems that they still may be and preferably are tried in that way." And we think it clear that informations brought by the United States for the punishment of criminal contempts constituting offenses against the United States are "criminal cases" within the meaning of the Criminal Appeals Act, in as real and substantial a sense as ordinary criminal prosecutions for the punishment of crimes. See *Bessette* v. *Conkey Company,* 194 U. S. 324, 335 *et seq.*

Whether the judgment sustaining the motion of the defendants in error and dismissing the information on the ground that the prosecution was barred by the statute of limitations, was a "judgment sustaining a special plea in bar" within the meaning of the Act, is to be determined not by form but by substance. *United States* v. *Thompson,* 251 U. S. 407, 412. The material question in such cases is the effect of the ruling sought to be reviewed. It is immaterial that the plea was erroneously designated as a plea in abatement instead of a plea in bar, *United States* v. *Barber,* 219 U. S. 72, 78, or that the ruling took the form of granting a motion to quash which was in substance a plea in bar, *United States* v. *Oppenheimer,* 242 U. S. 85, 86, *United States* v. *Thompson, supra,* 412. Here the motion to dismiss raised the bar of the statute of limitations upon the facts appearing on the face of the informa-

tion, and was equivalent to a special plea in bar setting up such facts. And the effect of sustaining the motion was the same as if such a special plea in bar had been interposed and sustained.

It is also clear that as the court had merely entered a preliminary order for the taking of testimony for use at the trial, and had not commenced its sitting for the trial, the defendants in error had not then been placed in jeopardy.

2. Finding, therefore, that we have jurisdiction under the writ of error, we proceed to consider the contention of the United States that the prosecution of the information was not barred by the limitation of one year prescribed in § 25 of the Clayton Act.

In *Gompers* v. *United States*, *supra*, 611, decided in May, 1914, it was settled that prosecutions for criminal contempts committed by violations of injunctions, were barred by the general three years' limitation applicable to non-capital crimes under R. S. § 1044.[4] And the sole question to be considered is whether this has been changed by § 25 of the Clayton Act, passed in October, 1914.

The provisions of the Clayton Act relating to the punishment of criminal contempt are in § § 21 to 25, inclusive. Sec. 21 provides "That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States . . by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided." Sec. 22 relates to the procedure, trial, punishment, etc., in proceedings for the punishment of "such contempt;" Sec. 23 to the allowance of writs of error. Sec. 24 provides "That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one . . may be pun-

[4]The amendment made to that section by the Act of 1921, 42 Stat. 220, c. 124, U. S. C., Tit. 18, § 582, is not here material.

ished in conformity to the usages at law and in equity now prevailing." And Sec. 25 provides "That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts. . ."

Although Sec. 25 is broad enough, upon its face, to provide a period of limitation of one year in all criminal contempts, we think that when construed in the light of the context and read in connection with the preceding sections, it does not relate to the prosecution for criminal contempts of the character here involved. The Act, as stated in *Michaelson* v. *United States, supra,* 66, is "of narrow scope," and "carefully limited to the cases of contempt specifically defined."

Sec. 21 relates only to the prosecution for the disobedience of orders, decrees, etc., by doing any forbidden act which is of such character as to constitute also a criminal offense under a Federal statute or State law. And Sec. 24 specifically declares that "nothing herein contained,"—meaning evidently no provision in the Act relating to prosecutions for criminal contempts—shall be construed to relate to contempts committed in disobedience of any order, decree, etc., entered in any suit brought in the name or on behalf of the United States; but that these and all other cases of contempt not specifically embraced within Sec. 21, may be punished in conformity to the prevailing usages at law and in equity.

It is plain, we think, that this specific exception in Sec. 24 applies to Sec. 25 relating to the period of limitations as well as to the other sections, and hence that the one year limitation prescribed by Sec. 25 has no application to the proceeding in the present case, which was brought for the disobedience of a decree entered in a suit brought and prosecuted in the name and on behalf of the United States.

We find nothing in the legislative history of the Act which indicates any different intention on the part of the Congress.

Judgment reversed.

Mr. Justice STONE did not sit in this case.